LIBRARY
SUPREME COURT, U. S.

No. [redacted]

Office-Supreme Court, U.S.
FILED
JUN 6 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

1607

HARRY R. SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MAURICE J. WALSH,
105 West Adams Street,
Chicago, Illinois 60603

ANNA R. LAVIN,
209 S. La Salle Street,
Chicago, Illinois 60604
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

	PAGE
Judgment and Opinion of the Court Below	1-2
Jurisdiction	2
Questions Presented	2-3
Statement of The Case	4-13
The Testimony of the Witness Dalia	7-12
Reasons For Granting The Writ	14-18
Conclusion	18
Appendix:	
Opinion of the Court Below	App. 1-29
Order Affirming	App. 30
Order Denying Petition for Rehearing	App. 31

AUTHORITIES CITED

Cases

Babb v. United States, 5 Cir., 218 F. 2d 538	15
Gaynor v. United States, C.A.D.C., 247 F. 2d 583	15
Leroy v. Government of Canal Zone, 5 Cir., 81 F. 2d 914	15
Namet v. United States, 373 U.S. 179	14

PAGE

Nigro v. United States, 8 Cir., 117 F. 2d 624 15

Payton v. United States, C.A.D.C., 222 F. 2d 794 15

Stephan v. United States, 6 Cir., 133 F. 2d 97 16

Summit Drilling Corp. v. Commissioner of Internal Revenue, 10 Cir., 160 F. 2d 703 16

United States v. Hall, 2 Cir., 138 F. 2d 853 15

United States v. Toner, 3 Cir., 173 F. 2d 140 15

United States v. Wilcher, 7 Cir., No. 14381, May 20, 1964 (not yet reported) 15

Walker v. United States, 8 Cir., 117 F. 2d 624 15

Constitution of the United States

Sixth Amendment, Constitution of the United States ... 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

HARRY R. SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The The Honorable, The Chief Justice And Associate Justices Of The Supreme Court of the United States:

The Petitioner, Harry R. Smith, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eighth Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Southern District of Iowa, Central Division, was entered on June 27, 1963, and is not reported, but appears

in the original record filed with, and certified by, the Clerk of the United States Court of Appeals, as a part of this record, and transmitted heretofore.

The opinion of the United States Court of Appeals for the Eighth Circuit, affirming said judgment, was filed on the 28th day of April, 1964. That opinion is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION

The Order of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the United States District Court for the Southern District of Iowa, Central Division, was filed on the 28th day of April, 1964. On May 12, 1964, it was ordered that the Petition for Rehearing be denied. This Petition is filed within 30 days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Eighth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where a Court's witness' testimony was, in substance, an admission that he pleaded guilty, where the other Government evidence against the Petitioner was entirely circumstantial, and where the Judge told the jury that the Court's witness was charged together with the Petitioner, are the adverse inferences arising from the witness' repeated invocation of the testimonial privilege cured by an admonition by the Court that the invocations are not to be given any weight?

2. Where the evidence showed an association between the Petitioner and his co-defendant (who was not on trial), and the co-defendant's testimony amounted to nothing more than admissions that he had pleaded guilty to the charge for which Petitioner was then on trial, has not Petitioner's right to be tried solely on the evidence against him, rather than the admission of another's guilt, been violated?

3. When a co-defendant, not on trial, called as a Court's witness, stands mute under cross examination by a defendant on trial, and his testimony given under examination by the prosecution is allowed to stand, will the Sixth Amendment tolerate conviction?

4. Is not the exercise of this Court's supervisory power required where conviction most probably rests on inferences from repeated invocations of the Fifth Amendment and the admission of a co-defendant's plea of guilty; where the constitutional right of cross examination is allowed to be frustrated; and where that Constitutional right is arbitrarily cut off?

STATEMENT OF THE CASE.

This Petitioner, Harry R. Smith, and one Frank Anthony Dalia were indicted by a Grand Jury in the Southern District of Iowa, charged with a violation of 18 U.S.C. Section 2113(a), in that on or about October 22, 1962, they, with the intent to commit a felony, to wit, larceny, entered the Altoona State Bank, Altoona, Iowa, the deposits of said bank being insured by the Federal Deposit Insurance Corporation.

Petitioner went to trial alone on the one count indictment, his named co-defendant, Dalia, having entered a plea theretofore under Rule 20 of the Federal Rules of Criminal Procedure. (App. 2)

The evidence established that sometime between 8 p.m. Sunday, October 21, 1962, and the early morning of October 22, 1962, a forceable entry was made into the Altoona State Bank and into a night depository safe located therein. Approximately $6,000, of which sixteen to eighteen hundred was in currency, was taken from the safe. (Tr. 44, 52, 183).[1]

Shortly after 1:15 a.m. on October 22, 1962, Iowa State Patrol Officer, Calvin White was proceeding in an easterly direction on Highway #90 from Altoona, Iowa to the Duffield farm, where he was to deliver some papers. In driving through Altoona he passed and noticed the Altoona State Bank, part of the new shopping center, located on the south side of Highway #90, but he proceeded on without stopping. (Tr. 60, 326). After completing his business at the Duffield farm and while he was headed back west

[1] All "Tr." references relate to the trial transcript.

toward Altoona on Highway #90, he noticed a car coming south on a gravel road which intersects with Highway #90. This car was a 1957, 1958, or 1959 DeSoto, dark color, and bore Illinois license plates. There was, and had been, no traffic between Duffield farm on Highway #90 and the gravel road on which DeSoto was traveling in a southerly direction. Officer White turned north on to the gravel road, pulled up directly opposite the DeSoto and directed the driver thereof to "hold it" or words to that effect. The driver of the DeSoto did not answer or comply with the request. He drove rapidly onto Highway #90 and turned east. Officer White backed onto the highway and began pursuit, following the other car at a distance of approximately 300 to 400 feet. The pursuit continued for about 5 miles, reaching speeds of 100 miles an hour.

At one point less than one half mile from the beginning of the chase, Officer White observed an object "moving" in the middle of his side of the road. He swerved north to avoid it. He had not seen it there when he drove west after completing his business at the Duffield farm. Shortly after swerving to avoid the moving object, he noted what appeared to be paper or something of that nature flying around in the air. After some distance both vehicles overtook and passed another car bearing an Ohio license. The chase ended with the DeSoto going out of control on a curve, traveling some 580 feet from the point it left the highway and ending overturned on its top. During the entire chase Officer White (except for an interval of a few seconds not pertinent here), had the DeSoto in his view, and at no time saw anything thrown or ejected from that car. The occupants of the DeSoto were identified as the Petitioner, Harry R. Smith, Paul Smith, his brother, who was killed in the accident, and Anthony Dalia, the named co-defendant not on trial. Petitioner and Dalia were badly injured. (Tr. 60-62, 87-99, 103, 105-108).

After they had been given first aid and efforts had been made to revive Paul Smith, Petitioner and Dalia were removed by ambulance to a hospital in Des Moines. Officer White then returned to the area where he had observed the object in the road, which turned out to be a Navy type sea bag containing a sledge hammer, pry bars and other tools. (Plaintiff's Exhibits 2, 5-9). Searches of the highway between 3½-6 hours after the accident resulted in finding currency, including a $100 bill, some 50's and smaller bills with an Altoona State Bank deposit slip attached by paper clip. There were also found several other Altoona State Bank night deposit envelopes containing checks and currency identified as having been deposited in the Altoona night depository safe during that portion of the weekend prior to the break-in. They were mainly found west of the Duffield farm but all within one and a half to two miles of the beginning of the route of the chase. (Tr. 77-78, 100, 104, 193, 203-209). In the opinion of expert witnesses, tools found in the green Navy type sea bag had been used on the doors of the Altoona State Bank and its safe, or from a safe painted and insulated in a similar manner. (Tr. 121-122, 138).

At the hospital Dalia was found to be wearing shoes, and no shoes were inventoried as part of Petitioner's clothing. (Tr. 232-3, 276, 228-230). The wrecked automobile was towed to Des Moines and about five and one half hours after the accident a pair of shoes was found in it. (Tr. 110-113). Soil samples taken from the ridge and striated soles of the shoes were similar to soil samples found in front of the Altoona State Bank safe door. (Tr. 150, 124-125, 130-132).

The above is the totality of the evidence introduced by the Government against this Petitioner, up to the time that Dalia (named co-defendant, not on trial) was brought into

Court to testify. The Court of Appeals for the Eighth Circuit recognized that all such evidence was, of course, circumstantial. (App. 27).

The Testimony of the Witness Dalia

It is about the appearance of the witness Dalia that this Petitioner centers his prayer that this Court grant Certiorari to review this cause. The bulk of that testimony is set forth in the opinion of the Court of Appeals for the Eighth Circuit as an extensive footnote. (App. 6-14).

The prosecutor requested "that Mr. Dalia be called as the Court's witness for the purpose of cross examination in view of the fact that he was named in this indictment." Objection was made by the defense because of the want of some basis or foundation. The Government then stated that it *felt* this witness had information bearing on the case, but that the government, in view of his implication, was not prepared to vouch for him. Thereupon, the request that Dalia be made a Court's witness was granted. (Tr. 234-236).

Under examination by the prosecutor, Mr. Dalia gave his name. To the next question "And Mr. Dalia have you also been known as Anthony Walters?", he invoked the Fifth Amendment. He was then asked "Whether or not you were charged in an indictment with entering the Altoona State Bank on October 22, 1962, the deposits of which were then and there insured in the Federal Deposit Insurance Corporation, with intent to commit a felony, to wit, a larceny, which the Grand Jury returned a charge against you?" Again Dalia invoked the Fifth Amendment, but the Court directed him to answer, and he answered in the affirmative. Then, in response to interrogation, he testified that he pleaded guilty to a case of bank

burglary at the Altoona State Bank in Altoona, Iowa, on October 22, 1962. The questioning proceeded and he answered that he had been involved in an accident in the early hours of October 22, 1962, in Iowa about five and one half miles east of Altoona. He was then asked who was in the car with him, and where he was in the early hours of October 21, 1962, to which questions he invoked the Fifth Amendment. He then stated, under the prosecutor's questioning, that he had lived in Chicago all his life. He invoked the Fifth Amendment to whether he was acquainted with the Petitioner in this cause; to whether he was acquainted with Mr. Paul Smith who was involved and killed in the accident; to how long he was in Iowa around the date of October 22, 1962; to whether he left Chicago with the here Petitioner; to how long he had been traveling on the road with the Petitioner. He stated under questioning that he was taken to Broadlawns General Hospital in Des Moines, Iowa, following the accident. He again invoked the Fifth Amendment to how long he was in Altoona, Iowa, on the evening of October 21, 1962, or the early morning of October 22, 1962; to how long the Petitioner was in Altoona on the evening of October 21st or the early morning hours of October 22nd; and, to whether he entered the front doors of the Altoona State Bank on that date. This concluded examination of Dalia by the Government. (Tr. 236-239).

Under examination by defense counsel he testified that he was now in the custody of the Attorney General of the United States under sentence in the United States District Court at Indianapolis, Indiana, serving a sentence based upon a plea to bank robbery in Indianapolis, which plea was entered on April 25. He testified he was transported to the Court from Indianapolis by the United States Marshall's Office and that he was presently confined in Polk

County Jail in the Federal section and that he received a 12 year sentence on the Indianapolis charge. He testified that the United States Attorney had not advised him of any rights, that he had no counsel for that purpose, that he desired counsel for that purpose, that he had gone to the 10th grade in school. (Tr. 240-241).

At that point, defense counsel addressed the court, indicating that he desired further cross-examination, but did not want to trample on the man's rights and that he felt that the witness should be advised. (Tr. 242).

The Court, then, out of the presence of the jury, proceeded to interrogate the witness. In response to such questioning Dalia stated that he would like to speak to an attorney before he answered any questions of the defendant but he had no funds to employ counsel. That he would like counsel in the way of protecting himself from any interrogatories posed by anyone, government or state. He stated that he had never had opportunity to communicate to the court that he desired counsel, but that he had indicated he desired counsel to the Marshal and that he did desire counsel before he proceeded further. (Tr. 242-243).

Whereupon the Court went into recess to take the matter under consideration.

On the following morning, Dalia appeared with counsel, one Frank Oliver, who had prepared and submitted to the Court a "motion for judgment of acquittal" in behalf of Dalia claiming, *inter alia*, improprieties and that "blandishment offered to him by the prosecution" induced him to enter his plea of guilty. That motion was taken under advisement, and thereupon counsel for this petitioner moved to strike the testimony of Dalia and for a mistrial. The motion for a mistrial was denied, but de-

cision on the motion to strike was reserved, and Dalia was directed by the Court to resume the witness stand over his protestation that his rights were being violated. (Tr. 245-272). Thereupon, this petitioner's counsel proceeded to continue his cross examination, which developed as follows:

"Q. Your name is Frank Anthony Dalia or Dalia?—

Mr. Lawler: I ask the Court to instruct the witness to answer.

The Court: The Court will not instruct the witness to answer because he has already answered that question.

Q. (By Mr. Lawyer) Mr. Dalia, state whether or not on the 22nd of October, 1962, you entered the Altoona State Bank, Altoona, Iowa?—

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: The Court will not compel the witness to answer the interrogatory.

Q. (By Mr. Lawyer) Mr. Dalia, did you or did you not advise anyone on behalf of the prosecution or an official of this court that you would refuse to testify prior to coming to Court yesterday?—

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: The Court will not require the witness to answer.

Q. (By Mr. Lawyer) Mr. Dalia, where do you live?—

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: The witness, if not having already answered, is not required to answer further.

Q. (By Mr. Lawyer) Mr. Dalia, I ask you whether or not you have any information which would bear on the innocence of Harry Smith sitting here to the left of me two persons down, this man sitting right here?—

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: The Court will not require the witness to answer.

Q. (By Mr. Lawyer) Mr. Dalia, you testified yesterday that you pleaded guilty to a charge of bank burglary in Indianapolis, Indiana, in connection with a bank in Indiana. State whether or not you received a concurrent sentence, identical to the sentence imposed in that case?

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: If the witness hasn't already answered, he is not required to answer.

The examination of this witness is now concluded. The Court's witness has now concluded. You will now retire from the witness stand. The jury will retire to the jury room.

(Whereupon the witness, Mr. Dalia, leaves the courtroom with a Marshal and the jury retires to the jury room.)

The Court: Let the record show in this cause that the witness Dalia has taken the witness stand at the Court's request. That opportunity of cross examination has been afforded the defendant prior to this time and again at this time. That there has been in every aspect a constant injection into the record by counsel for the defendant of questions that have already and previously been asked and answered. That this Court is not about to tolerate any aggravation of any matters that may have occurred heretofore. That it is apparent to the Court, and the Court wants this a part of the record, that he wants this an orderly, carefully tried case in accordance with the interest of the defendant and of all parties concerned. That the administration of justice requires this statement in the record at this time, and defendant's counsel, and the defendant, is given due exception to the remarks of the Court. This has been made out of the presence of the jury. That will be all.

Call the jury back and proceed.

Mr. Lawyer: Your Honor, may I make a little further record, please?

Comes now the defendant and respectfully asks the Court to declare a mistrial for the reason the defendant has not been afforded an opportunity to cross examine the witness and has there been deprived under Article [*sic*] 6.

The Court: It's overruled. Call the jury.

Mr. Gross: Your Honor, at this time could we request that Dalia be returned to the courtroom for purposes of identification by another witness?

The Court: No, you may not." (Tr. 272-275).

The Motion to strike upon which ruling had been reserved, was subsequently denied. Relative to the testimony of Dalia, the jury was instructed as follows:

"INSTRUCTION NO. 3

"A Grand Jury for this District returned an Indictment against Harry R. Smith and Frank Anthony Dalia. During the course of the trial, testimony has been received concerning a plea of guilty as it relates to one of the witnesses, Frank Anthony Dalia. With respect to this matter, you are told that you will not consider the matter of a plea of guilty as evidence against the defendant in this cause. The fact of this plea in no way means or implies that the defendant herein on trial, Harry R. Smith, is guilty as charged. Any plea of Frank Anthony Dalia does not give rise to any inference as to the guilt of Harry R. Smith now on trial. The guilt or innocence of the defendant here on trial must be determined solely by the evidence introduced at the trial of this case. Likewise you will not speculate as to the significance of the plea of Frank Anthony Dalia nor will you give it any consideration in arriving at your verdict concerning the defendant in this case.

"You are further told that only Harry R. Smith is here on trial and the fact that the name of Frank Anthony Dalia appears as one of the co-defendants in the Indictment shall be given no significance.

"An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. If you find that the witness Frank Anthony Dalia is an accomplice, the credibility is for the jury to pass upon. However, such testimony should be received with caution and weighed and scrutinized with great care bearing in mind all portions of this instruction.

"INSTRUCTION NO. 4

"The witness Frank Anthony Dalia after having given some testimony made claim to the constitutional right against self-incrimination, which claim was sustained by the Court. The fact that said witness made said claim and that said claim was sustained by the Court is not to be given any weight or consideration by you arriving at your verdict." (App. 19-20)

As to the admission that Dalia had pleaded guilty, the Court of Appeals for the 8th Circuit found no prejudice because of the trial court's instructions set forth herein above. As to the invocation of the privilege against self-incrimination, the Court of Appeals for the 8th Circuit also considered any error obviated by the instructions. As to the refusal of Dalia to testify on cross examination by petitioner's counsel, the Court of Appeals for the Eighth Circuit, on this record,[2] found that Appellant's counsel invited the witness to claim his privilege with the result that after Dalia had arranged for counsel, he thereupon refused to take the witness stand and at no time thereafter did he answer any questions but remained mute. "Such building of a hedge in order to rely thereon as error is like knocking down a strawman which one has created for that very purpose and effect." (App. 21).

[2] The entire proceeding has been set forth here so that this Court might weigh the merit of the Court of Appeals opinion. It is apparent that all instances of invoking the testimonial privilege were prior to the "suggestion" of defense counsel that the witness be "advised", which suggestion was adopted by the trial court.

REASONS FOR GRANTING THE WRIT

This court should exercise its jurisdiction in this case for the following reasons:

I.

We interpret this Court's recent decision in *Namet* v. *United States*, 373 U.S. 179, as standing for the proposition that invocation of the 5th Amendment by a Government's witness is not necessarily prejudicial; that the circumstances may be such that the interest of justice is better served by allowing the invocation of the testimonial privilege in certain circumstances. We recognize that the circumstances will change from case to case, but the circumstances in *Namet* must, in the absence of a definitive rule, stand as a guide-post in consideration of whether the adverse inferences arising from repeated invocation of the testimonial privilege prejudice the defendant on trial. Those sign posts include the benefit of counsel. This Court also considered the jury was not told in the *Namet* case that the Kahns had been arrested or charged together with Namet. In the *Namet* case, the Kahns had theretofore given Government investigators information that supported the Government's case against Namet. This Court also found that non-privileged information to which the Kahns testified was used to corroborate the Government's case, and, in that sense, the testimonial privilege was tolerated that the benefit of the truth might be obtained. Further, the Kahn incident in the Namet trial constituted but minor lapses in a long trial. (This was but a three and one half day trial, including defense).

The Court will note that every articulated basis and reason for affirmance in the *Namet* case is conspicuously absent here. Nor do any like circumstances or even similar, analogous circumstances in this record justify the ac-

tion. There was no balance of benefit and detriment to be considered. The only thing that flowed from the repeated invocation of the testimonial privilege by Dalia was the almost inevitable inference that the answers, if given, would have incriminated this petitioner. We submit that this Court should grant Certiorari because the decision in this cause on this point is directly in conflict with this Court's decision in *Namet* and justice has not been aided, but done a disservice, by the procedure.

II.

In this case the evidence showed an association between the petitioner and his co-defendant, who was not on trial. This coupled with the co-defendant's testimony, given reluctantly and over his emphatic protest, that he had pleaded guilty to the charge for which petitioner was then on trial is recognized error. The decision of the Court of Appeals for the 8th Circuit on this point is in direct conflict with the following decisions with Courts of Appeals for other Circuits and of its own Circuit. Those decisions in conflict include:

Nigro v. *United States*, 8 Cir., 117 F. 2d 624.
Walker v. *United States*, 8 Cir., 93 F. 2d 383.
Leroy v. *Government of Canal Zone*, 5 Cir., 81 F. 2d 914.
Payton v. *United States*, C.A.D.C., 222 F. 2d 794.
Gaynor v. *United States*, C.A.D.C., 247 F. 2d 583.
United States v. *Toner*, 3 Cir., 173 F. 2d 140.
United States v. *Hall*, 2 Cir., 138 F. 2d 853.
Babb v. *United States*, 5 Cir., 218 F. 2d 538.

We submit further that the very recent case of *United States of America* v. *Lawrence Wilcher*, 7 Cir., No. 14381, May 20, 1964, not yet reported, is also in conflict with the decision of the Court of Appeals for the Eighth Circuit in this cause.

III.

It is our submission that when a co-defendant not on trial, called as a court's witness, stands mute under cross examination by defendant on trial and his testimony given under examination by the prosecutor is allowed to stand, there has been a very serious violation of the Sixth Amendment to the Constitution of the United States, a far departure from the accepted and usual course of judicial proceedings, calling for an exercise of this court's power of supervision. We submit that the failure to strike out the testimony of Dalia when Dalia refused to submit to cross examination by petitioner's counsel is in direct conflict with the rules set forth by the Sixth Circuit in *Stephan* v. *United States,* 133 F. 2d 97:

> "'The general rule is that 'where the witness after his examination-in-chief on the stand has refused to submit to cross examination, the opportunity of such probing and testing his statements as substantially failed and his direct testimony should be struck out.' Wigmore on Ev., *supra,* Section 1391, page 112, and cases cited in the footnote." (133 F. 2d at 97)

So unusual in the course of criminal law is the denial of cross examination that authorities on the point are practically non-existent. Turning however to Civil law, those cases stand universally for the proposition that all testimony on which cross examination is frustrated must be stricken. *Summit Drilling Corp.* v. *Commissioner of Internal Revenue,* 10 Cir., 160 F. 2d 703. We submit that the decision of the United States Court of Appeals for the Eighth Circuit is in direct conflict with the civil authorities. The accepted course of judicial proceedings would require an even higher standard in this criminal case, where the Sixth Amendment right to confrontation and its correlative right to cross examination applies.

IV.

This is a case where the petitioner was seriously prejudiced, probably convicted, by the government's introducing his co-defendant as a witness against him, especially where all other evidence was clearly, and admittedly, circumstantial.

The co-defendant's repeated invocation of the Fifth Amendment, in the absence of his giving any testimony that aided the seeking of truth, corroboration or explanation of the cause being tried, could only reflect upon the petitioner.

The co-defendant's compelled admission that he had pleaded guilty to the cause on trial, after it had been established that he was associated with the petitioner, and who testified to no facts in the aid of ascertaining the truth of the charge against the petitioner, could only have resulted in guilt by association.

The fact that the trial court told the jury that Dalia's invocation of the testimonial privilege was "not to be given any weight or consideration by you in arriving at your verdict" and that "you will not speculate as to the significance of the plea of Frank Anthony Dalia nor will you give it any consideration in arriving at your verdict" was itself too tepid to acquire significance. But, in the light of the other instructions of the Court, any force it might be thought to have was nullified and obliterated.

Telling the jury that petitioner and Dalia were co-defendants, he continued:

> "An accomplice is one who unites with another in the commission of a crime, voluntarily and with common intent. If you find that the witness Frank Anthony Dalia is an accomplice, the credibility is for the jury to pass on. However, such testimony should be received with caution and weighed and scrutinized with great care . . . "

It is obvious that any finding that Dalia was an accomplice, on this record, would depend on the association of the two, the invocation of the testimonial privilege, the charging of the two in the same indictment, the admission by Dalia he had pleaded guilty. No caution or scrutiny is appropriate to a man's admission he had pleaded guilty: It will be believed and accepted as complete truth.

All of this was magnified and enhanced by the toleration of a refusal to submit to cross examination on behalf of the petitioner (such a violation of the Sixth Amendment as not to require argument), and the cutting off of that cross examination.

"The examination of this witness is now concluded.

The Court's witness has now concluded."

This cutting-off was particularly harmful, where defense counsel was attempting to show that Dalia's plea of guilty brought a sentence concurrent with the sentence on another conviction — and that, as a practical matter, Dalia actually lost nothing by his plea.

We believe it would be next to impossible to find a case where such deviations from accepted standards of justice and procedural safeguard coincided in one cause. We submit that this Court's supervisory power is sorely needed, to prevent repetition of deviation from basic principles of fair trial, and to obviate any conception that such deviations will be tolerated now, or in the future.

CONCLUSION.

Wherefore, for the above and foregoing reasons, it is respectfully submitted that a writ of certiorari should issue.

Respectfully submitted,

MAURICE J. WALSH,
ANNA R. LAVIN,
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,449.

Harry R. Smith, Appellant, vs. United States of America, Appellee.	}	Appeal from the United States District Court for the Southern District of Iowa.

[April 28, 1964.]

Before VOGEL, MATTHES and BLACKMUN, Circuit Judges.

VOGEL, Circuit Judge.

Harry R. Smith, the appellant, and Frank Anthony Dalia, a/k a Anthony Walters, were indicted by a grand jury in the Southern District of Iowa, charged with a violation of 18 U.S.C.A. § 2113(a), in that on or about October 22, 1962, they, with the intent to commit a felony, to-wit, larceny, entered the Altoona State Bank, Altoona, Iowa, the deposits of said bank being insured by the Federal Deposit Insurance Corporation. Smith was enlarged on bail in the amount of $40,000. Dalia, whose bail was reduced by

this court to $20,000, was also released. Subsequently Dalia was charged with a similar offense in the District of Indiana for which he did not furnish bail. On April 25, 1963, Dalia entered a plea of guilty to the Indiana charge and under Rule 20 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., also entered a similar plea to the Iowa offense, both pleas being made in the United States District Court for the District of Indiana. On May 2, 1963, Dalia was sentenced to concurrent terms of 12 years on each of the two offenses.

Appellant Smith entered a plea of not guilty to the charge contained in the indictment in the Southern District of Iowa, was tried before a jury, found guilty and on June 27, 1963, was sentenced to confinement for a period of 20 years. Smith has appealed to this court, asking that the judgment of conviction be reversed. He raises five points of alleged error as follows:

> "1. That this appellant was grossly prejudiced in the circumstances by the calling of his named co-defendant as a court's witness, and his repeated invocation of his privilege against self-incrimination.
>
> "2. That, by calling the co-defendant, Dalia, for the sole purpose of having him admit to his prior plea guilty, deprived this appellant of his absolute right to have the charges presented determined by the evidence presented against him and not by what happened with regard to a criminal prosecution against someone else. This was further aggravated by the Courts telling the jury that the indictment brought by the Grand Jury, named Dalia and the appellant jointly.
>
> "3. That, though the government was allowed to cross-examine Dalia, his claim of right to refuse to be cross-examined by this appellant was sustained, in absolute violation of the Sixth Amendment to the Constitution of the United States.

"4. That evidence was introduced against the appellant without a showing of ownership or possession, and remote as to place and time, and conviction rests on inference built on inference.

"5. That expert opinion testimony supporting his theory of defense was denied this appellant, and, that this denial was especially aggravated by foreclosing opportunity to counteract the effect of the testimony of the government's expert witnesses."

A resume of the evidence upon which the jury found Smith guilty is necessary to an understanding of appellant's claims of error and a weighing of his claims of prejudice thereby.

The evidence established that sometime between 8 p.m. Sunday, October 21, 1962, and the early morning of October 22, 1962, a forcible entry was made into the Altoona State Bank and into a night depository safe located therein. Approximately $6,000, of which $1600 to $1800 was in currency, was taken from the safe.

At shortly after 1:15 a.m. on October 22, 1962, Iowa State Patrol Officer Calvin White was proceeding in an easterly direction on Highway No. 90 from Altoona, Iowa, to the Duffield Farm, where he was to deliver some papers. In driving through Altoona he passed and noticed the Altoona State Bank, part of a new shopping center, located on the south side of Highway 90 but he proceeded on without stopping. After completing his business at the Duffield Farm and while he was headed back west toward Altoona on Highway 90, he noticed a car coming south on a gravel road which intersects with Highway 90. This car was a 1957, 1958 or 1959 DeSoto, dark colored, and bore Illinois license plates. There was and had been no traffic between the Duffield Farm on Highway 90 and the gravel road on which the DeSoto was traveling in a southerly direction.

Officer White turned north onto the gravel road, pulled up directly opposite the DeSoto and directed the driver thereof to "hold it" or words to that effect. The driver of the DeSoto did not answer or comply with the request. He drove rapidly onto Highway 90 and turned east, at times attaining a rate of speed estimated in excess of 100 miles per hour. Officer White backed onto the highway and began pursuit, following the other car at a distance of approximately 300 to 400 feet.

At one point less than a half mile from the beginning of the chase he observed an object "moving" in the middle of his side of the road. He swerved north to avoid it. It had not been seen there when he drove west after completing his business at the Duffield Farm and other than his patrol car and the car he was pursuing there had been no traffic on that portion of the highway during that time. Shortly after swerving to avoid the moving object, he noted what appeared to be paper or something of that nature flying around in the air. After some distance both vehicles overtook and passed another car bearing an Ohio license. The chase ended after about five and a half miles of high-speed driving with the DeSoto going out of control on a north curve, traveling some 580 feet from the point it left the highway and ending overturned on its top. The occupants of the DeSoto were identified as the appellant, Harry R. Smith, Paul Smith, his brother, who was the driver and who was killed in the accident, and Anthony Dalia, the appellant's co-defendant herein. Appellant and Dalia were badly injured.

After they had been given first aid and efforts had been made to revive Paul Smith, appellant and Dalia were removed by ambulance to a hospital in Des Moines. Officer White then returned to the area where he had observed the object in the road, which turned out to be a Navy-type

sea bag containing a sledge hammer, pry bars and other tools. A search of the highway over which the pursuit had continued resulted in finding currency including a $100-bill, some 50's and smaller bills with an Altoona State Bank deposit slip attached by paper clip. There were also found several other Altoona State Bank night deposit envelopes containing checks and currency identified as having been deposited in the Altoona night depository safe during that portion of the weekend prior to the break-in. These were mainly found west of the Duffield Farm but all within one and one-half miles to two miles of the beginning of the route of the chase. In the opinion of expert witnesses, tools found in the green Navy-type sea bag had been used on the doors of the Altoona State Bank and its safe.

Appellant's first three claims of error spring from the calling of Smith's co-defendant, Dalia, as a "Court's witness", the testimony elicited from him as well as the fact that on numerous occasions he refused to answer, claiming his privilege under the Fifth Amendment. Near the close of the government's case the United States Attorney requested "that Mr. Dalia be called as the Court's witness for the purpose of cross-examination in view of the fact that he was named in this indictment." Defendant objected "to any witness being called as a Court's witness without some basis or foundation". The government attorney then stated:

> "If the Court please, the witness Anthony Dalia was named in the indictment which is part of the Court record and has entered a plea of guilty in Indiana to the charge of entering the Altoona State Bank, the identical indictment in which the defendant is charged, that is, entering the Altoona State Bank to commit a felony, to-wit, to commit a larceny. The Government feels this witness has information bearing on this case, but the Government in view of his implication is not prepared to vouch for him."

The government's motion was granted. Dalia was called as a "Court's witness", his testimony being set forth in the margin.[1]

---

[1] "EXAMINATION BY MR. GROSS:

Q. Would you state your full name?

A. Frank Anthony Dalia.

Q. And Mr. Dalia, have you also been known as Anthony Walters?

A. I invoke the Fifth Amendment.

Q. Mr. Dalia, I am going to ask you whether or not you were charged in an indictment with entering the Altoona State Bank on October 22nd, 1962, the deposits of which were then and there insured in the Federal Deposit Insurance, with intent to commit a felony, to-wit, a larceny, which the Grand Jury returned a charge against you?

A. I never had an Indictment read to me to that effect.

Q. Did you enter a plea of guilty to that charge?

A. To the one you just stated?

Q. Yes.

A. I would like to invoke the Fifth Amendment there, also.

THE COURT: The Court at this time will tell you to answer.

A. Yes, sir.

Q. Pardon?

A. Yes, I did.

Q. Your testimony is that you did enter a plea of guilty to a charge of entering the Altoona State Bank?

A. No, I didn't enter a plea to that. I entered a plea of guilty, but not to that specific charge.

Q. What did you plead guilty to?

A. It was a case of bank burglary.

Q. At the Altoona State Bank?

A. Yes.

Q. In Altoona, Iowa?

A. Yes.

Q. On October 22nd, 1962?

A. I imagine so, yes.

Q. Is your answer to your last question 'yes'?

A. Yes, sir.

The practice in criminal cases of calling someone as a court's witness, while seldom used and not particularly desirable, is recognized as proper in both state and federal courts. *United States* v. *Lutwak*, 7 Cir., 1952, 195 F.2d 748, 754-755; Anrot., 67 A.L.R.2d 538. The exercise of the

---

Q. Now, Mr.—Do you pronounce that Dalia or Dalia?

A. Dalia.

Q. Dalia?

A. Yes, sir.

Q. And were you involved in an accident, Mr. Dalia, in the early morning hours of October 22nd, 1962?

A. I so was.

Q. And where did that accident take place?

A. In Iowa. I don't know exactly where.

Q. Would it have taken place about five and one-half miles east of Altoona?

A. I imagine so.

Q. And who was in the car with you, Mr. Dalia?

A. I would like to invoke the Fifth Amendment.

THE COURT: The Court will not compel the answer.

Q. Mr. Dalia, where were you in the early evening hours of October 21st, 1962?

A. I would also like to invoke the Fifth Amendment.

Q. And where is your home, Mr. Dalia?

A. Chicago.

Q. How long have you lived there?

A. All my life.

Q. And are you acquainted with the defendant in this case, Harry R. Smith?

A. I would like to invoke the Fifth Amendment.

Q. Are you acquainted with the gentleman who was involved and killed in the accident—Mr. Paul Smith?

A. The Fifth Amendment on that also.

Q. How long were you in Iowa around the date of October 22nd, 1962?

A. The Fifth Amendment on that.

Q. Did you leave Chicago, Illinois, with the defendant, Harry R. Smith?

A. The Fifth Amendment.

Q. How long had you been traveling on the road with the defendant, Harry R. Smith?

right or rule is a discretionary matter with the trial court and only for an abuse of that discretion resulting in prejudice to the defendant will the trial court be judged in error and a conviction reversed. The result of one being

---

A. The Fifth Amendment.

Q. Following the accident did you go to Broadlawns General Hospital?

A. I was taken to a hospital.

Q. Here in Des Moines, Iowa?

A. Yes.

Q. How long were you in Altoona, Iowa, on the evening of October 21st, 1962, or the early morning of October 22nd, 1962?

A. The Fifth Amendment.

Q. Do you know how long the defendant in this case, Mr. Harry R. Smith, was in Altoona on the evening of October 21st or the morning hours of October 22nd?

A. The Fifth Amendment.

Q. Pardon?

A. The Fifth Amendment.

Q. Did you enter the—Strike that.

Did you enter the front doors of the Altoona State Bank on that date?

A. The Fifth Amendment.

MR. GROSS: I have no further questions.

MR. LAWYER: [Attorney for appellant] Your Honor, could I beg leave of Court for about a five-minute delay for the purpose of consultation with counsel?

THE COURT: You shall have it. The Court at this time will take a ten-minute recess. The jury will retire to the jury room, bearing in mind the former admonitions.

(Recess: 4:13 p.m. to 4:30 p.m.) (Whereupon jury returned into open court and the record proceeded, to-wit:)

EXAMINATION BY MR. LAWYER:

Q. Mr. Dalia, you are now in the custody of the Attorney General of the United States under a sentence from the United States Federal District Court at Indianapolis, Indiana, is that correct?

A. Yes, sir.

Q. And you are serving at this time a sentence based upon a plea to bank burglary in Indianapolis, Indiana, is that correct?

A. Yes, sir.

called as a court's witness is not too dissimilar from that of having a witness adjudged a hostile or a surprise witness. The effect is that neither party to the suit may be held responsible for the testimony of the witness and both

---

Q. And when was that plea entered?

A. April 25th. I believe.

Q. And then were you transported here from Indianapolis, is that true?

A. Yes, sir.

Q. By the United States Marshal's office?

A. Yes, sir.

Q. And you're now confined in Polk County jail in the federal section, is that true?

A. Yes, sir.

Q. And you received, I believe, a 12-year sentence in Indianapolis, is that true?

A. Yes, sir.

Q. And that was on the Indianapolis charge, was it not?

A. Well, it was in Indianapolis, the court. It was in New Albany, Indiana, a charge.

Q. Since you have been here, Mr. Dalia, has the United States Attorney advised you of your rights in any respect?

A. No, sir.

Q. Do you have counsel at this time for that purpose?

A. No, sir.

Q. Do you desire counsel for that purpose?

A. Yes, sir.

Q. What's your education, sir?

A. Ten years.

Q. Tenth grade?

A. Tenth grade, yes, sir.

MR. LAWYER: If the Court please, there is further cross-examination of this witness which I feel is necessary. I don't feel that I want to pursue or trample on his rights and I feel that he should be entitled to be advised.

THE COURT: Members of the jury, at this time we will take our regular evening intermission. You will bear in mind the admonitions heretofore given you by the Court and be at recess until 9:30 a.m. tomorrow morning. You are recessed. The jury is recessed.

of course may exercise the privilege of cross-examination. Probably the leading and most cited case in connection with the calling of a witness by the court is *Litsinger* v.

(Recess: 4:35 p.m., Tuesday, May 14, 1963.) (Following record made in absence of jury:)

EXAMINATION BY THE COURT:

Q. Mr. Dalia, are you here on any charge?—You're not here charged, here with anything, are you?

A. In this court?

Q. Yes?

A. No, sir.

Q. And you are here as a witness, is that all?

A. Well, there is a state charge pending against me.

Q. But you're not here on any charge, here in this court?

A. No, sir.

Q. And is it my understanding from your answer to the cross-examination of the defendant's counsel that you were in need of counsel here?

A. Well, I would like to speak to an attorney; yes, sir.

Q. Do you have the funds with which to employ counsel?

A. No, I don't.

Q. And you desire to speak to a lawyer with relation to this matter?

A. Yes, sir.

Q. That is, before you answer any questions of the defendant?

A. Yes, sir.

Q. And this is for the purpose of being able to answer questions now proposed to be made by counsel for the defendant?

A. Well, in the way of protecting myself. That's what I would like counsel for.

Q. From any interrogatories here proposed by the defendant?

A. By anyone, the Government or State.

Q. You have already made your answers to the one. You never indicated to the Court that you desired counsel, have you?

A. I never had the opportunity.

Q. I see. Have you indicated to anyone you desired counsel?

A. Yes, sir.

Q. To whom have you indicated you desired counsel?

A. I believe I mentioned to the Marshal.

United States, 7 Cir., 1930, 44 F.2d 45, wherein the court, stated at page 47:

"The rule which permits the trial court to call and examine a witness at the request of the government's attorney is quite a reasonable one and is well recog-

---

Q. And you do desire counsel before yo uproceed further?
A. Yes, sir.
THE COURT: The Court will take the matter under consideration. Court's at recess.
(Recess: 4:37 p. m.)"

On the following morning, Frank Oliver was introduced to the court as a member of the Chicago bar, his admission to practice was moved, granted and he thereupon entered the record as "attorney for the witness Frank Anthony Dalia". Attorney Oliver had prepared and submitted to the court a "Motion for Judgment of Acquittal" in behalf of Dalia claiming, inter alia, improprieties and that "blandishments offered to him by the prosecution" induced him to enter his plea of guilty. The motion was taken under advisement. Thereupon, Smith moved the court to strike the testimony of the witness Dalia and for a mistrial. The motion for a mistrial was denied. Ruling on the motion to strike Dalia's testimony was reserved. Whereupon, Dalia was returned into open court and the following transpired:

"THE COURT: Take the witness stand.
MR. DALIA: Your Honor, I would like to speak to my lawyer before I get back on the stand.
THE COURT: You may.
(Whereupon the witness proceeds to the rear of the courtroom and visits with Mr. Oliver following which the following record was made.)
MR. DALIA: Your Honor, my attorney has advised me I don't have to take the stand because my rights are being violated.
THE COURT: What did you say?
MR. DALIA: My attorney has advised me I don't have to take the stand because of the fact my rights are being violated.
THE COURT: That you will have to take the stand by reason they are?

nized. If judiciously exercised it is productive of no harm; and many times, by extending to attorneys the right to cross-examine and to impeach on material matters, it prevents a failure of justice."

MR. DALIA: No, I don't have to, Your Honor.

THE COURT: And you don't want to take the stand?

MR. DALIA: No, sir.

THE COURT: And it is my understanding that you refuse to take the stand?

MR. DALIA: Because of the fact my rights are being violated. I am being brought in this court against my wishes. I was brought out of Indiana without opportunity to consult counsel.

THE COURT: You will take the stand.

MR. DALIA: Pardon?

THE COURT: You will take the witness stand.

MR. DALIA: Your Honor, it's a violation of all my rights to take the stand.

THE COURT: The Court has told you to take the witness stand. Take the witness stand.

MR. DALIA: Do you want to protect my rights?

THE COURT: I asked you to take the witness stand.

MR. DALIA: Your Honor, you are forcing me to it without my rights.

EXAMINATION BY MR. LAWYER (continuing):

Q. Your name is Frank Anthony Dalia or Dalia?—

MR. LAWYER: I ask the Court to instruct the witness to answer.

THE COURT: The Court will not instruct the witness to answer because he has already answered that question.

Q. (By Mr. Lawyer) Mr. Dalia, state whether or not on the 22nd of October, 1962, you entered the Altoona State Bank, Altoona, Iowa?—

MR. LAWYER: I request the Court to instruct the witness to answer.

THE COURT: The Court will not compel the witness to answer the interrogatory.

Q. (By Mr. Lawyer) Mr. Dalia, did you or did you not advise anyone on behalf of the prosecution or an official of this court that you would refuse to testify prior to coming to Court yesterday?—

Judge Learned Hand, in *United States* v. *Marzano*, 2 Cir., 1945, 149 F.2d 923, said at page 925:

> "It is permissible, though it is seldom very desirable, for a judge to call and examine a witness whom the parties do not wish to call. *United States* v. *Breen*.

MR. LAWYER: I request the Court to instruct the witness to answer.

THE COURT: The Court will not require the witness to answer.

Q. (By Mr. Lawyer) Mr. Dalia, where do you live?—

MR. LAWYER: I request the Court to instruct the witness to answer.

THE COURT: The witness, if not having already answered, is not required to answer further.

Q. (By Mr. Lawyer) Mr. Dalia, I ask you whether or not you have any information which would bear on the innocence of Harry Smith sitting here to the left of me two persons down, this man sitting right here?—

MR. LAWYER: I request the Court to instruct the witness to answer.

THE COURT: The Court will not require the witness to answer.

Q. (By Mr. Lawyer) Mr. Dalia, you testified yesterday that you pleaded guilty to a charge of bank burglary in Indianapolis, Indiana, in connection with a bank in Indiana. State whether or not you received a concurrent sentence, identical to the sentence imposed in that case?—

MR. LAWYER: I request the Court to instruct the witness to answer.

THE COURT: If the witness hasn't already answered, he is not required to answer.

The examination of this witness is now concluded. The Court's witness has now concluded. You will now retire from the witness stand. The jury will retire to the jury room.

(Whereupon the witness, Mr. Dalia, leaves the courtroom with a Marshal and the jury retires to the jury room.)

THE COURT: Let the record show in this cause that the witness Dalia has taken the witness stand at the Court's request. That opportunity of cross-examination has been afforded the de-

2 Cir., 96 F.2d 782, 784; *United States* v. *Gross* 7 Cir., 103 F.2d 11, 43. A judge is more than a moderator: he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert. *Quercia* v. *United States*, 289 U.S. 466, 469, 53 S.Ct. 698, 77 L.Ed. 1321; *Montrose Contracting Co.* v. *Westchester County*, 2 Cir., 94 F.2d 580, 583."

While holding in that case that the calling of a witness as a court's witness was a proper procedure, the court there nevertheless reversed because the trial judge "entered the lists" and threatened the witnesses who had

---

fendant prior to this time and again at this time. That there has been in every aspect a constant injection into the record by counsel for the defendant of questions that have already and previously been asked and answered. That this Court is not about to tolerate any aggravation of any matters that may have occurred heretofore. That it is apparent to the Court, and the Court wants this a part of the record, that he wants this an orderly, carefully tried case in accordance with the interest of the defendant and of all parties concerned. That the administration of justice requires this statement in the record at this time, and defendant's counsel, and the defendant, is given due exception to the remarks of the Court. This has been made out of the presence of the jury. That will be all.

Call the jury back and proceed.

MR. LAWYER: Your Honor, may I make a little further record, please?

Comes now the defendant and respectfully asks the Court to declare a mistrial for the reason the defendant has not been afforded an opportunity to cross-examine the witness and has there been deprived under Article 6.

THE COURT: It's overruled. Call the jury.

MR. GROSS: Your Honor, at this time could we request that Dalia be returned to the courtroom for purposes of identification by another witness?

THE COURT: No, you may not.

(Whereupon the jury returned into open court.)

pleaded guilty but whom he had not yet sentenced. The implication of the trial judge's threat was that if the witnesses persisted in certain testimony which he believed untrue, penalties heavier than he first intended would be invoked. Of course a conviction based on such gross error was reversed and a new trial ordered.

Among the cases relied on by the appellant and which we find are distinguishable on their facts, appellant cites and particularly points to a case from the Supreme Court of Illinois, *People v. Bennett*, 1953, 413 Ill. 601, 110 N.E.2d 175. That is, of course a state case propounding the law of the State of Illinois but it is also distinguishable for a number of other reasons. There the appellant Bennett and one Kirkpatrick were *separately* indicted for burglary and larceny. Bennett was brought to trial before Kirkpatrick. During Bennett's trial Kirkpatrick was subpoenaed as a witness. He asked leave to intervene for the purpose of objecting to his being called as a witness for the reason that his appearance and examination would tend to incriminate him. Nevertheless, the court allowed the state's attorney to call Kirkpatrick as a witness and over Bennett's objection was allowed to show that Kirkpatrick was under separate indictment for burglary and larceny. He was repeatedly questioned concerning the details of the alleged crime and compelled to again and again rely on his constitutional privilege by refusing to answer the questions. The Illinois court stated at page 176 of 110 N.E.2d:

> "The practice of the court's calling a witness at the request of the prosecution in a criminal case has been recognized where the person called is an eye-witness to the crime and the State's Attorney doubts the veracity and integrity of such witness.
> This practice, however, has been restricted to cases

where it is shown that otherwise there might be a miscarriage of justice. *People* v. *Laster*, 413 Ill. 224, 108 N.E.2d 421; *People* v. *Johnson*, 333 Ill. 469, 165 N.E. 235."

Kirkpatrick had refused to talk to the state's attorney about the answers to certain questions prior to appearance in court so the state was aware the privilege would be claimed. Holding that the showing made by the state was insufficient, the court stated at page 176 of 110 N.E.2d:

"* * * Not only did the State's Attorney fail to make a proper showing, but by his questions before the jury compelling the witness to claim his constitutional privilege, he was able to suggest by implication, innuendo and insinuation that Kirkpatrick and defendant had committed the crime for which defendant was on trial. While the examination added little material evidence to the trial, it was certainly well calculated to prejudice the defendant in the eyes of the jury. Moreover, nothing was shown thereby without which a miscarriage of justice would have resulted. In light of the lack of a proper showing by the State's Attorney in making his request and the resulting prejudicial effect, it was error for the court to call Kirkpatrick as its own witness and allow a cross-examination by the People."

After directing attention to a number of other errors in the trial, the court said at page 179 of 110 N.E.2d:

"* * * Whether each individual error here recited would itself be sufficient ground for reversal we need not determine, as there can be no doubt that collectively they produce such prejudice and error as to make it incumbent upon this court to reverse the judgment."

Here the government had practically concluded submission of its case. Uncontradicted testimony linked co-defendant Dalia with the appellant Smith. Dalia was

found in the same car with Smith and Smith's brother, who was killed in the accident. Dalia had been a co-defendant in the case. He was named in the body of the indictment, "* * * the defendants Harry R. Smith and Frank Anthony Dalia, aka Anthony Walters, entered the Altoona State Bank * * *." Dalia had entered a plea of guilty after the charge against him was, at his request, transferred under Rule 20, Federal Rules of Criminal Procedure, 18 U.S.C.A., to the District of Indiana, where his plea of guilty was accepted and wherein he received a 12-year sentence. It would seem perfectly obvious that Dalia did possess information pertinent to the issues presented in the trial against appellant Smith. It would also seem natural that the government should have been hesitant about sponsoring Dalia as its witness and we think it not unreasonable that the government asked the trial court to designate Dalia as a court's witness so that the right to cross-examine might be had. Another method of arriving at the same result would have been the calling of Dalia as a government witness with the expectation that inasmuch as he had already pleaded guilty and had been sentenced that there was no reason why he should not testify to the truth. If, when so called, Dalia testified to what the government believed was not the truth, the government could ask for the right to cross-examine on the grounds of surprise or that Dalia was a hostile witness. The government did not know what Dalia's testimony would be as it had made no inquiry from him prior to the time he was placed on the stand. Be that as it may, we find no abuse of discretion on the part of the trial court in granting the government's motion and allowing the government to cross-examine Dalia.

It will be noted that almost from the beginning, Dalia picked out certain questions, claiming the Fifth Amendment privilege as to his being forced to answer thereto,

The information received from him by the government's examination was insignificant because of his exercise of that privilege. The fact that he had been a co-defendant, that he had been with Smith and Smith's brother in the automobile which was chased by Officer White was already known to the jury through the testimony of a number of witnesses whose statements were not controverted prior or subsequent thereto. Appellant had not testified at that time and did not testify at all during the trial. No prejudice resulted to Smith by the calling of Dalia, his cross-examination and his admission that he was a co-defendant and that he had entered a plea of guilty and had been sentenced in the United States District Court for the District of Indiana. Failure to have called Dalia under the circumstances existing might have furnished the appellant with the inference that his, Dalia's testimony would have been against the government. As was said by Judge Gardner in *Wesson* v. *United States*, 8 Cir., 1949, 172 F.2d 931, 936:

> "* * * But the government did not produce any or either of these parties as witnesses. [Persons to whom the defendant in that case allegedly made sales of narcotics.] Defendant was clothed with the presumption of innocence and it was incumbent upon the government to prove his guilt beyond a reasonable doubt. The failure of the government, under the circumstances disclosed, to call these witnesses justifies, if it does not compel, the inference that their testimony would have been against the government. *Aetna Casualty & Surety Co.* v. *Reliable Auto Tire Co.*, 8 Cir. 58 F.2d 100; *Goldie* v. *Cox*, 8 Cir., 130 F.2d 695; *Donnelly Garment Co.* v. *Dubinsky*, 8 Cir., 154 F.2d 38; *Futrell* v. *Arkansas-Missouri Power Corporation*, 8 Cir., 104 F.2w 752."

The contention that the appellant was prejudiced through Dalia testifying that he had entered a plea of guilty to burglarizing the Altoona State Bank cannot be sustained.

Judge Hanson was meticulous in his instruction to the jury with reference to Dalia. He stated:

"INSTRUCTION NO. 3

"A Grand Jury for this District returned an Indictment against Harry R. Smith and Frank Anthony Dalia. During the course of the trial, testimony has been received concerning a plea of guilty as it relates to one of the witnesses, Frank Anthony Dalia. With respect to this matter, you are told that you will not consider the matter of a plea of guilty as evidence against the defendant in this cause. The fact of this plea in no way means or implies that the defendant herein on trial, Harry R. Smith, is guilty as charged. Any plea of Frank Anthony Dalia does not give rise to any inference as to the guilt of Harry R. Smith now on trial. The guilt or innocence of the defendant here on trial must be determined solely by the evidence introduced at the trial of this case. Likewise you will not speculate as to the significance of the plea of Frank Anthony Dalia nor will you give it any consideration in arriving at your verdict concerning the defendant in this case.

"You are further told that only Harry R. Smith is here on trial and the fact that the name of Frank Anthony Dalia appears as one of the co-defendants in the Indictment shall be given no significance.

"An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. If you find that the witness Frank Anthony Dalia is an accomplice, the credibility is for the jury to pass upon. However, such testimony should be received with caution and weighed and scrutinized with great care bearing in mind all portions of this instruction.

"INSTRUCTION NO. 4

"The witness Frank Anthony Dalia after having given some testimony made claim to the constitutional right against self incrimination, which claim was sus-

tained by the Court. The fact that said witness made said claim and that said claim was sustained by the Court is not to be given any weight or consideration by your arriving at your verdict."

This court in *Nigro* v. *United States*, 8 Cir., 1941, 117 F.2d 624, had occasion to deal with, among other things, the question of the propriety of telling the jury that co-defendants of the one on trial had pleaded guilty. The court said at page 632:

> "* * * The jury, however, should not be told that defendants the Conleys and Darling have pleaded guilty, unless they appear as witnesses and testify to their guilt. See *Walker* v. *United States*, 8 Cir., 93 F.2d 383, 395."

In the instant case, no objection was made at the time Dalia testified that he had entered a plea of guilty, although subsequently thereto motions to strike and for a mistrial were made by appellant. We hold, however, that if there could possibly have been any prejudice to the appellant through Dalia, who testified as a witness that he had pleaded guilty, it was well healed by the trial court's careful admonition in Instructions Nos. 3 and 4, supra. "Our theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States*, 1954, 348 U.S. 84, 95.

In *Wood* v. *United States*, 8 Cir., 1960, 279 F.2d 37 this court, through Judge John Sanborn, said at page 363:

> "We think the trial court did what it should have done, when it advised the jury panel that the defendants Brown and Nair had entered pleas of guilty to Count I of the indictment, and as to the effect of the pleas upon other defendants. We also approve the statement of the court to the jury with respect to the entry of pleas of guilty by Kawell, Nendeck, and Bar-

ham to Count I during the trial. See, in this connection: *Davenport* v. *United States*, 9 Cir., 260 F.2d 591, 596; *Holmes* v. *United States*, 8 Cir., 134 F.2d 125, 129-130; *Kelling* v. *United States*, 8 Cir., 121 F.2d 428, 429. The court did not err in denying the motion for a mistrial based on the fact that the pleas of guilty to Count I by three of the defendants were entered after the trial commenced; nor did it err in not again referring to these guilty pleas, or their effect, in its final instructions to the jury."

Appellant Smith's contention that he was prejudiced by Dalia's repeated invocation of the privilege against self-incrimination, and thereby denied the opportunity of cross-examination, is also unpersuasive. First, it will be noted that Dalia began claiming his privilege from the second question asked him by the government, although he did answer on preliminary and collateral matters. When counsel for the appellant began his cross-examination, Dalia answered each question, at no time claiming his privilege until counsel for the appellant suggested that he needed the advice of counsel before he was to be cross-examined further. In effect, he invited the witness to then claim his privilege. The result was that after Dalia had arranged for counsel, he thereupon at first refused to take the witness stand and at no time thereafter did he answer any question but remained mute. Such building of a hedge in order to rely thereon as error is like the knocking down of a straw man which one has created for that very purpose and effect. It caused no prejudicial error by the trial court, particularly in light of the court's Instruction No. 4, supra.

It must be conceded, of course, that the right of one charged with crime to confront the witnesses against him is guaranteed by the Sixth Amendment and that that includes the right of cross-examination. If the right to cross-

examine such witness is unduly restricted, the witness' entire testimony should be stricken but there are exceptions. As was stated in *United States* v. *Cardillo*, 2 Cir., 1963, 316 F.2d 606, 611:

"* * * However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. *United States* v. *Kraritz*, 3 Cir. 1960, 281 F.2d 581; *Hamer* v. *United States* 9 Cir. 1958, 259 F.2d 274; *United States* v. *Toner*, 3 Cir. 1949 173 F.2d 140. *On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part. Montgomery* v. *United States*, 5 Cir. 1953, 203 F.2d 887; cf. *United States* v. *Andolschek*, 2 Cir. 1944, 142 F.2d 503; *Stephens* v. *United States*, 6 Cir. 1943, 133 F.2d 87; *United States* v. *Krown*, W.D. Ky. 1937, 19 F.Supp. 639." (Emphasis supplied.)

And at page 613:

> "*This is not to say that every refusal to answer by a witness, claiming his constitutional right against self-incrimination, requires the striking of his testimony or a part thereof.* There would appear to be at least three categories to be considered. The first would be one in which the answer would have been so closely related to the commission of the crime that the entire testimony of the witness should be stricken. The second would be a situation in which the subject matter of the testimony was connected solely with one phase of the case in which event a partial striking might suffice. The third would involve collateral matters or cumulative testimony concerning credibility which would not require a direction to strike and which could be handled (in a jury case) by the judge's charge if questions as to the weight to be ascribed to such testimony arose. As to the first and second categories suggested, whether all or a part of the testimony should be stricken, must depend upon the discretion of the trial judge exercised in the light of the particular circumstances. Unsatisfactory as such a generality is for a trial judge who is required to give instantaneous rulings on close questions and who does not enjoy the luxury of reflective appellate deliberation, any set of specific dogmas would be even more unworkable." (Emphasis supplied.)

In the instant case, Dalia, when examined by the government, testified to his name, the fact that he entered a plea of guilty, that he lived in Chicago all of his life, that he was involved in an accident about five and a half miles west of Altoona on October 22, 1962, and that following the accident he was taken to a hospital in Des Moines, Iowa. These were merely preliminary or collateral matters. On all other questions propounded by the government he maintained his privilege. When Dalia was first examined by appellant's counsel, he answered every ques-

tion asked of him, covering the information he had given in answer to the government's questions as fully as when examined by the government. On no question did he maintain his privilege. After he had engaged counsel, however, at the suggestion of appellant's attorney, he refused at first to return to the witness stand and when he did he remained mute. It should be noted that his answers to questions propounded by appellant's counsel covered the same preliminary ground he covered upon being examined by the government. We therefore find no prejudice to the appellant and no error in refusing to strike the preliminary answers given by Dalia in examination by both parties. We believe that the court's admonition adequately took care of the situation.

The fourth claimed error in effect is an attack upon the sufficiency of the evidence. It has to do particularly with (1) the green Navy-type sea bag filled with different kinds of tools which, concededly, had been used to enter the Altoona State Bank and to break the safe; (2) checks and papers found on the highway showing to have originated from the Altoona Bank, and currency picked up on the highway or the ditches thereof during the search; (3) a pair of shoes found about five and a half hours after the accident in the passenger compartment of the wrecked car in which the appellant, the co-defendant Dalia and Paul Smith, the driver who was killed, were riding. It is the contention of the appellant that:

> "There was a failure to prove that the tools, found to have been used to enter the bank and safe, were ever in the fleeing automobile, or in the possession of its occupants":

that

> "There was a failure to prove, beyond the inventory that the appellant was not wearing shoes when admitted to the hospital":

and that

> "* * * Nothing alleged to have been removed from the Bank was found in the possession of Smith, Dalia or the dead man, or in the car."

Appellant's contention is, in substance, that the exhibits referred to were admitted without proper foundation; that there was no connection between such exhibits and the appellant; and that the government's case against the appellant rests on inference built on inference.

This case, having been submitted to a jury and the jury having returned a verdict of guilty, must be viewed in the light most favorable toward sustaining the jury verdict. We must assume that all conflicts in the evidence, if there were such, were resolved by the jury in favor of the government and the government, as the prevailing party, is entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proven. If reasonable minds might reach different conclusions or draw different inferences, then the jury's determination must be sustained. *Slocum* v. *United States*, 8 Cir., 1963, 325 F.2d 465, 468; *Thogmartin* v. *United States*, 8 Cir., 1963, 313 F.2d 589, 590; *Koop* v. *United States*, 8 Cir., 1961, 296 F.2d 53, 54; *Valentine* v. *United States*, 8 Cir., 1961, 293 F.2d 708, 710; *Dean* v. *United States*, 8 Cir., 1957, 246 F.2d 335, 336-337.

First, with reference to the green sea bag containing the tools which were used to break into the bank and safe, we think the government introduced sufficient evidence to justify the jury in connecting the appellant with the bag and the tools contained therein. The testimony is uncontradicted that just prior to the high-speed chase, no other cars, with the exception of Officer White's patrol car, had traversed that portion of the highway between

the Duffield Farm and the gravel road leading north from Highway 90. When Officer White covered this portion of the highway immediately prior to the chase he saw no objects. The vehicle in which the appellant was riding refused to stop when requested to do so by Officer White, who was driving a patrol car with a red top light. The driver of the vehicle in which appellant was riding attempted to outrun the patrol car. After getting onto Highway 90, it proceeded in an easterly direction over the same portion of the road Officer White had just traversed. It traveled at speeds estimated in excess of 100 miles per hour. Officer White followed within a distance estimated at 300 feet. During this chase he saw an object moving across the highway which turned out to be the tool bag in question. He also saw numerous objects appearing to be paper fluttering in the air, but concededly he did not see the bag or other objects thrown from the moving car in which the appellant was riding. As to the question of the shoes, the testimony indicates that, following the accident, both Dalia and Paul Smith, the deceased, were wearing shoes; that the appellant Smith was not wearing shoes and that sometime subsequently a pair of shoes was found in the wrecked car and that soil samples taken from the ridged and striated soles of the shoes were similar to soil samples found in front of the Altoona State Bank safe door. We do not view this testimony as allowing the jury to pile inference on inference and thus arrive at a verdict of guilty based upon mere suspicion and conjecture. The jury's conclusions that the appellant and his cohorts in the fleeing car threw the damaging evidence consisting of the sea bag with its tools, concededly used in the burglary, into the path of the pursuing officer and that they threw the checks, currency and deposit slips from the Altoona Bank

out of the car as they fled in front of the officer, are parallel inferences deduced from uncontroverted evidence. The jury could similarly infer that the appellant Smith, who had no shoes on when he arrived at the hospital, was the owner of the single pair of shoes found in the car in which he had been riding, which shoes contained soil samples similar to that found in front of the Altoona Bank safe. The evidence against the appellant is, of course, circumstantial, but it is also very convincing and we hold it to be sufficient to justify the jury's conclusion that the appellant was one of those who participated in the burglary of the Altoona Bank.

Appellant's fifth and last point has to do with the trial court's rejection of certain expert testimony offered in appellant's behalf. George S. Reese, being called by the appellant, testified that he had been employed for 17 or 18 years in repairing safes and door locks and many times came in contact with safes that had been broken open and professed a special knowledge in the area of safe insulation. He identified Exhibit H as a piece of "fireproof insulation of a fireproof door, cabinet-type"; and testified that fireproof insulation was generally made from the same materials but that "different manufacturers have their own specifications that they use. It isn't all exactly the same"; that when insulation was broken up, it becomes dusty and very light; that it is difficult to work around safe insulation without getting it on your clothing and that he had at times had it all over his clothing. He was then asked:

> "Q. Mr. Reese, based upon your experience and knowledge working with safes, do you have an opinion as to whether or not a person could work in and

near this safe without having some fibrous dust or something on his clothing?

"Mr. Gross: Object, Your Honor, calling for the opinion and conclusion of the witness and no proper foundation has been laid for this testimony.

"The Court: Sustained.

"Mr. Lawyer: The defendant offers in evidence Exhibit H.

"Mr. Gross: Object, Your Honor, on the grounds that it's incompetent, irrelevant and immaterial to any issue in this case, no connection at all, no probative value.

"The Court: Sustained at this time unless there is further examination at this time to connect it up with this."

Thereupon the witness was asked to compare Exhibit H with Plaintiff's Exhibit 13, which was part of the Altoona Bank safe door. He stated that it was "similar" and that Exhibit H was "a fairly representative piece of insulation material found on an ordinary safe". Exhibit H was then re-offered and the government's objections thereto overruled.

Prior to the introduction of Reese's testimony, the appellant had called Andrew Newquist, a special agent of the Iowa Bureau of Criminal Investigation, Identification Division, who had testified earlier in behalf of the government that he had sent the appellant's clothing to the FBI laboratory in Washington. Newquist testified, upon being called by the appellant, that there was no report from the FBI laboratory as to the finding of a concrete or fibrous substance on the appellant's clothing; that he did not recall any such substance being found or reported to have been found on the shoes found in the wrecked automobile or in the soil sample, Exhibit 12. We cannot find that the appellant was in any way prejudiced by the court's ruling with reference to the question regarding the fibrous dust from "this safe". Appellant

was allowed to show that similar insulation was likely to stick to clothing, that it was difficult to work around safe insultation without getting it on one's clothing, and that the FBI laboraory reports did not disclose any insulation material found in the clothing taken from the appellant, the shoes found in his car or the soil samples connected with the soles of the shoes. In other words, the appellant got before the jury practically all the testimony he desired, the only exclusion being that the witness was not allowed to answer the question when it was directed to "this safe" and its fibrous dust. Reese showed no familiarity with "this safe" and this particular insulation. The trial court acted within its discretion in sustaining the government's objection and we find that in so doing its discretion was in no way abused. *United States* v. *Stoppelmann*, 8 Cir., 1959, 266 F.2d 13, 20; *Walsh* v. *Bekins Van Lines Co.*, 8 Cir., 1954, 217 F.2d 388, 390; *Davis* v. *R. K. O. Radio Pictures, Inc.*, 8 Cir., 1951, 191 F.2d 901, 903-904. Here, even though an offer of proof was not made, the record indicates that appellant brought to the jury's attention everything he was entitled to have; i. e., that a similar substance would most likely get into the clothing of persons working in the vicinity and that reports of the FBI laboratory as to appellant's clothing did not indicate that the appellant's clothing had such substance therein.

A careful review of this substantial record impels the conclusion that the appellant was fairly tried, that the evidence of his guilt was substantial, and that no prejudicial error was committed.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17449

SEPTEMBER TERM, 1963.

HARRY R. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appeal from the United States District Court for the Southern District of Iowa.

This Cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Harry R. Smith, do surrender himself to the custody of the United States Marshal for the Southern District of Iowa, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

April 28, 1964.

Order entered in accordance with Opinion:-

Robert C. Tucker
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1963.

No. 17449

HARRY R. SMITH, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Southern District of Iowa.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 12, 1964.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:

Casados v. *United States*, 300 F. 2d 845, certiorari denied, 373 U.S. 938 — 8

Emspak v. *United States*, 349 U.S. 190 — 11

Johnson v. *United States*, 318 U.S. 189 — 10

Mills v. *United States*, 281 F. 2d 736 — 11

Namet v. *United States*, 373 U.S. 179 — 8, 9, 10

United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959 — 10

United States v. *Cardillo*, 316 F. 2d 606, certiorari denied, 375 U.S. 822 — 11

United States v. *Crosby*, 294 F. 2d 928, certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984 — 8

United States v. *Mercks*, 304 F. 2d 771 — 11

Constitution and statute:

Constitution of the United States, fifth amendment — 5, 8, 11

18 U.S.C. 2113(a) — 2

Miscellaneous:

5 Wigmore, *Evidence*, § 1391, 3d ed., 1940 — 11

737-693—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 160

HARRY R. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 331 F. 2d 265.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1964. A petition for rehearing was denied on May 12, 1964. The petition for a writ of certiorari was filed on June 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioner's trial was unfair because a codefendant, while testifying as a court's witness, responded to several

questions by invoking the privilege against self-incrimination, and because the codefendant testified that he had pleaded guilty to the charge.

2. Whether petitioner was denied the right of cross-examination.

STATEMENT

In the United States District Court for the Southern District of Iowa, a grand jury returned an indictment charging petitioner and codefendant Frank Dalia with entering a federally insured bank with intent to commit larceny, in violation of 18 U.S.C. 2113(a) (I.R.1). Dalia, while in Indiana, pleaded guilty to the charge under Rule 20. A few weeks later, petitioner was tried before a jury and was convicted (I.R. 64, 147). He was sentenced to a term of 20 years imprisonment (I.R. 147). The court of appeals affirmed the conviction (Pet. App. 1–29; 331 F. 2d 265).

The pertinent facts may be summarized as follows:

1. Late one Sunday night, October 21, 1962, the night deposit safe inside a federally insured bank in Altoona, Iowa, was broken open and robbed of $6,535.50 (IV.R. 43–45). At 1:15 a.m. Monday morning, a state highway patrol officer, Calvin White, who did not know about the larceny, left Des Moines, drove east on Route 90 through the town of Altoona and continued east about 1½ miles to the Duffield farm where he left some papers in the mailbox (IV.R. 57–58). Between Altoona and the farm the highway was deserted except for a single car which passed the farm, traveling east, while he was occupied at the

mailbox. He saw no objects lying on the road (IV.R. 58, 81).

After completing his business, about 1:30 a.m., Officer White turned around and drove back toward Altoona. After traveling about ½ mile without seeing any traffic, he saw a DeSoto with Illinois license plates traveling south on a gravel road toward the highway. Turning up the gravel road, he stopped beside the DeSoto and said "hold it" (IV.R. 59–60). Almost immediately, the DeSoto drove away, turned east on to the highway, and accelerated to a speed of 100 miles per hour. Officer White gave chase at a distance of 300–400 feet. Just before passing the Duffield farm, he had to swerve suddenly from his lane to avoid hitting an object moving in the middle of the road. Then, to use his words, he saw paper "floating in the air and it just looked like I was driving through all kinds of paper flying around" (IV.R. 60–62). A few miles later, both cars passed a third car with Ohio license plates; and shortly after that, the DeSoto missed a sharp curve and spun off the road (IV.R. 63–64).

On reaching the damaged car, Officer White found petitioner's brother, who was dead, in the driver's seat, petitioner beside him in the front seat, and co-defendant Dalia in the back seat (IV.R. 64, 66). After spending an hour administering first aid and calling an ambulance for petitioner and Dalia, he returned to the place where he had seen the object moving, and there, beside the road, he found a bag of tools (IV.R. 66–67). Several other bags of tools and a wheelbarrow were packed into the trunk of the DeSoto

(IV.R. 167). On the front floorboard of the car, to the right where petitioner was sitting, lay a pair of canvas shoes (IV.R. 112, 163). Of the three occupants of the car, only petitioner was not wearing shoes after the accident (IV.R. 231–233; V.R. 276). Shortly after 5 a.m., Officer White and three others searched along the road. In the area where Officer White had seen the flying paper, scattered for a distance of some 1½ miles, they found over $1,000 in currency, over $4,500 in checks, deposit slips, and deposit envelopes. The checks, slips, and envelopes were known to have been stolen from the Altoona bank's night deposit safe (IV.R. 44–52, 75–78, 156–157, 209–219).

Experts from the F.B.I. Laboratory testified at the trial that markings left on the bank door and the safe could have been made only by a crowbar and a hammer from the tool bag found on the road by Officer White (IV.R. 67, 138–139, 159–164). On other tools from the same bag, the experts discovered dust and paint chips that corresponded to the insulation material and the two layers of paint used on the safe (IV. R. 118–122). The treads on the soles of the canvas shoes—the ones found by petitioner's seat in the car—fit a tread mark left at the scene of the crime, and in the treads was soil that matched soil found beside the safe (IV.R. 112, 122–125, 131–132, 150, 159–163).

2. Before the trial, codefendant Dalia was transferred from Indiana to Iowa (IV.R. 240–241). In his opening statement to the jury, the Assistant United State Attorney described Dalia as a passenger in the car and as having "entered a plea to the charge of

the Altoona State Bank." Dalia, he said, would be one of the last witnesses and would be asked what he knew about the events charged in the indictment (IV.R. 40). Neither of petitioner's two trial counsel objected.

On the second day of trial, near the end of the government's case and in the presence of the jury, the Assistant asked that Dalia be called as a court's witness for cross-examination "in view of the fact that he was named in this indictment" (IV.R. 234). Petitioner did not object. After the jury left the courtroom, the Assistant argued that Dalia had "information bearing on this case," but that the government would not vouch for his credibility (IV.R. 235–236; Pet. App. 5).[1] The Court granted the request over petitioner's objection to calling any witness as a court's witness (IV.R. 235).

After the jury returned, the government began its examination of Dalia, which may be summarized as follows: (1) after Dalia gave his name, he responded to the second question—whether he was also known as Anthony Walters—by invoking the Fifth Amendment; (2) next, he denied having been indicted for the Altoona bank theft, but invoked the Fifth Amendment when asked if he pleaded guilty to such a charge; (3) after the court disallowed the claim of privilege, he admitted entering the plea; (4) he answered the next series of questions, testifying that on October 22, he was in an automobile accident 5½ miles east of

[1] Since most of the trial transcript concerning Dalia's testimoney is set forth in the opinion below, paralleled citations have been given to the pages of the opinion, printed in petitioner's appendix.

Altoona; (5) then when asked who else was in the car and where he was the previous evening, he again invoked the privilege; (6) next, he answered two questions by saying that he had lived in Chicago his entire life; (7) he claimed the privilege against five consecutive questions, which asked how long he had been in Iowa and whether he knew or had traveled with petitioner or his brother; (8) in answer to the next two questions, he testified that he was taken to a Des Moines hospital after the accident; and (9) he responded to the final three questions—how long he was in Altoona, how long petitioner was there, and whether he entered the bank—by invoking the Fifth Amendment (IV.R. 236–240; Pet. App. 6–8). Petitioner did not object at any time during the examination.

When counsel for petitioner took the witness, he brought out that Dalia was serving a sentence for a bank burglary in Indiana, and that he had been transported to Iowa for the trial.[2] Under further questioning, Dalia testified that he was unaware of his rights and desired the services of an attorney. At this time, the court excused the jury and, before adjourning for the day, probed deeper into Dalia's request for legal representation (IV.R. 240–243; Pet. App. 8–11).

Before the jury entered the courtroom the following morning, a Chicago attorney appeared for Dalia and informed the court that his client intended to

[2] No mention was made during the examination that Dalia's Indiana sentence ran concurrently with his sentence for entering the bank in Altoona.

appeal[3] or to attack collaterally the sentence on his plea of guilty—which Dalia claimed was coerced—to the Altoona bank burglary. The attorney further informed the court that he had advised Dalia not to answer any further questions at petitioner's trial because, should the attack be successful and should Dalia be tried later under the Altoona indictment, answering any questions would amount to self-incrimination (I. R. 64–67; V. R. 244–256).[4] At this time, petitioner's counsel moved for a mistrial and to strike Dalia's testimony (V. R. 258). Finding that the government had not acted intentionally and that there were no aggravating circumstances, the court denied both motions (V. R. 258–270, 360–361).

When the jury entered, the court ordered Dalia—despite his repeated protests that his "rights" were being violated—to take the witness stand. Petitioner's counsel, resuming cross-examination, asked the witness six questions: (1) his name; (2) whether he entered the Altoona bank; (3) whether he advised the government that he would not testify; (4) where he lived; (5) whether he had information to show petitioner innocent; and (6) whether, in view of his plea of guilty, he had been sentenced concurrently for the Altoona bank theft. Throughout the questioning, Dalia sat mute—never saying a word. Petitioner's requests that the

[3] The attorney believed that an appeal would be timely because the ten day period for taking an appeal expired while Dalia was without counsel and while he was being transported from Indiana to Iowa.

[4] Aside from his declared intention to appeal, Dalia was facing state charges in Iowa and South Dakota, involving different crimes, which arose from his association with petitioner (I. R. 19–21, 48–49).

witness be instructed to answer were denied, the court replying either the witness had already answered the question, or he was not required to answer, or both (V.R. 272–274; Pet. App. 12–13). When the examination ended, petitioner moved for a mistrial, claiming a denial of the right to cross-examine the witness (V.R. 275; Pet. App. 14).

None of the arguments of counsel to the jury mentioned Dalia's testimony. The judge charged the jury not to give any weight to Dalia's plea of guilty or his invoking of the Fifth Amendment (I.R. 77–78; V.R. 361–413; Pet. App. 19–20).

ARGUMENT

1. It is settled that a conviction will not be reversed merely because a codefendant has invoked the privilege against self incrimination or has revealed an earlier plea of guilty. To be sure, in some cases, where the government has acted improperly or the accused has been severely prejudiced, the trial may be so unfair as to require its reversal. *E.g., Namet* v. *United States,* 373 U.S. 179, 186–187; *Casados* v. *United States,* 300 F. 2d 845, 848 (C.A. 5), certiorari denied, 373 U.S. 938; *United States* v. *Crosby,* 294 F. 2d 928, 948–50 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States,* 368 U.S. 984. But the application of this rule to the facts of this case does not warrant review by this Court.

The government acted properly in asking that Dalia be called as a court witness. Since Dalia was shown to be involved, failure to call him could have given rise to an unfavorable inference if he were not produced. And since Dalia had already pleaded

guilty and received sentence, there was no reason to suppose that he would invoke the Fifth Amendment, although the government could not vouch for his credibility. *Namet* v. *United States*, 373 U.S. at 188. That Dalia had pleaded guilty was brought out early in the examination before it was clear that he would insist on claiming the privilege. Not until the next day did the government learn that Dalia was claiming the privilege because he intended to attack his guilty plea on appeal.[6]

Petitioner was not harmed by Dalia's testimony. Dalia did not incriminate petitioner. Indeed, petitioner made vigorous efforts to put before the jury the very matters of which he now complains. During the government's examination of Dalia, petitioner made no objection at any time.[6] Only on the next day, after the examination was over, did he move for a mistrial and to strike the testimony. And then, after making those motions, petitioner's counsel asked Dalia questions that required answers which would incriminate him.[7] Even when Dalia refused to an-

[5] The State charges against Dalia involving different crimes (see n. 4, *supra*) were never mentioned when his attorney explained why self-incrimination was being claimed. In any event, the government's knowledge of these charges did not prevent examination of Dalia on matters related to the Altoo a burglary, but unrelated to the State charges, for, as this court indicated in *Namet* v. *United States*, 373 U.S. at 188, the government had a right to question the witness on such nonprivileged matters.

[6] Nor did he object earlier in the trial when the government described Dalia as a codefendant who had pleaded to the charge (IV.R. 40, 234).

[7] Counsel asked Dalia whether he had any information that would show petitioner was innocent, and whether Dalia had

swer those or any other questions, counsel persisted by reminding the witness of his plea of guilty and by inquiring into the details of his sentence (IV.R. 274; Pet. App. 13). Such unusual tactics must be attributed to a desire "to nurse [the alleged prejudice] along to the point of reversibility" (*United States* v. *Agueci*, 310 F. 2d 817, 840 (C.A. 2), certiorari denied, 372 U.S. 959), or to a hope that Dalia, after showing his knowledge of the burglary by admitting his own guilt, would testify that petitioner was innocent. In either case, petitioner acquiesced in the course that the trial took and cannot now complain of matters which he chose to disregard.[8] *Namet* v. *United States*, 373 U.S. at 189; *Johnson* v. *United States*, 318 U.S. 189, 201.

Moreover, in the present case the evidence of guilt—which is set forth in detail in the Statement above—was overwhelming. None of the arguments of counsel to the jury referred to Dalia who, as noted, had given no testimony favorable or unfavorable to petitioner. The court cautioned the jury not to use the plea or the claim of privilege as evidence against petitioner. In such circumstances, petitioner was not denied a fair trial.[9]

---

entered the Altoona bank on October 22 (IV.R. 272, 273; Pet. App. 12, 13). The second question was identical to one asked earlier by the government, and which Dalia had answered by claiming the privilege.

[8] A further reason for thinking that petitioner's failure to object was not inadvertent is that his two trial counsel objected frequently at other times; in fact, during the 1½ days of trial before Dalia testified, they objected on 46 occasions.

[9] There is no conflict between the present case and the cases relied on by petitioner (Pet. 15). In those cases the circum-

2. Nor is there any merit to petitioner's contention that he was denied the right of cross-examination (Pet. 16). The right to cross-examine is the right to examine the witness on testimony which he has previously given, and the remedy for a denial of that right is to strike the earlier testimony. *E.g., United States* v. *Cardillo,* 316 F. 2d 606, 610–614 (C.A. 2), certiorari denied, 375 U.S. 822; 5 Wigmore, *Evidence,* § 1391 (3d ed., 1940). In the present case, when the government examined Dalia as a court's witness, his sole testimony consisted of a few collateral answers that were inconsequential to the trial. Therefore, there was nothing on which to cross-examine him. There is no denial of the right to cross-examine when a government witness, who did not incriminate the accused in his testimony on direct examination, invokes the Fifth Amendment [10] when cross-examined. *United States* v. *Mercks,* 304 F. 2d 771 (C.A. 4); *cf. United States* v. *Cardillo,* 316 F. 2d at 610–614.

---

stances were extremely aggravated or the Court merely held that a codefendant's plea of guilty is not evidence against an accused, a proposition not in issue in the present case.

[10] Although Dalia sat mute—instead of explicitly claiming the privilege against self-incrimination—when petitioner examined him, his attorney had earlier informed the court that he had advised his client to assert his Fifth Amendment rights by not answering any further questions (V.R. 244–256). Under the circumstances, Dalia's conduct was sufficient notice that he was claiming the privilege. *Mills* v. *United States,* 281 F. 2d 736, 740–742 (C.A. 4); see *Emspak* v. *United States,* 349 U.S. 190, 194.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE WIESEMAN,
Attorneys.

JULY 1964.

FILED
OCT 22 1964
JOHN F. DAVIS, CLERK

No. 160

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

HARRY R. SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MAURICE J. WALSH,
105 West Adams Street,
Chicago, Illinois 60603

ANNA R. LAVIN,
209 S. La Salle Street,
Chicago, Illinois 60604
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA Review 5-65-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 160

HARRY R. SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUUPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The major purpose of this reply is to bring to the attention of the Court the decision of the Court of Appeals for the District of Columbia in *Fletcher* v. *United States*, 332 F. 2d 724, decided April 30, 1964, and published in the advanced sheets on August 10, 1964, long after the Petition for the Writ was filed in this Court. It is respectfully submitted that this decision presents a conflict of decision

between that Circuit and the decision of the 8th Circuit and the case at bar, and presents an additional reason for the grant of Certiorari. We indicated in this Court, and in the Court of Appeals for the Eighth Circuit, that our interpretation of this Court's decision in *Namet* v. *United States*, 373 U.S. 179, was that invocation of the Fifth Amendment by a government witness, while not necessarily prejudicial, must be diligently considered to determine whether the prejudice and peril to a defendant is outweighed by the minimal benefit to the interests of justice. It was our further contention that the interest of justice was not served in this case; that the only result of the government inducement and presentation as evidence of the invocation of the Fifth Amendment was a necessarily adverse consequence to the defendant. The Court of Appeals for the Eighth Circuit, though *Namet* constituted almost the entire argument of this Petitioner, on appeal never adverted to that case in its decision. On the other hand, the Court of Appeals for the District of Columbia, in *Fletcher*, showed a conscientious effort to relate the circumstances in the *Fletcher* case to the guides and sign posts indicating the standard of prejudice or permissibility laid down in *Namet*. Using such guide posts, the Court of Appeals for the District of Columbia reversed the conviction in *Fletcher*. The circumstances in *Fletcher* are, with one exception, identical with the circumstances in this case. The Court of Appeals for the District of Columbia held as follows:

> "Among the circumstances of the case at bar are the following features: (1) The Government knew, and the court also knew, that Anderson would refuse to testify upon his claim of the privilege under the Fifth Amendment. (2) The prosecutor asked a series of questions, which depicted the alleged offense in its entirety. The questions were not a 'few lapses' as

referred to in Namet. (3) The testimony sought from Anderson was the principal source of support for the testimony of the Government's only witness, the cab driver, and thus, if the jury drew inferences from Anderson's refusal to answer, those inferences would have served that purpose. (4) Anderson's refusals to testify were not incidents in the course of other admissible testimony given by him. He gave no other testimony. Save for the formalities, such as name, age and address, his refusals constituted the whole of his participation in the case. (5) Anderson's refusals were not mere incidents in a long trial. The trial was a short one, actually occupying some six hours spread over parts of two days, and Anderson's part in it was a major feature of the proceeding. (6) Although the court instructed the jurors that they should draw no inferences of guilt from Anderson's refusals, it added that the exercise by Anderson of his constitutional right 'does not mean by itself, of course, that this defendant is guilty.' The jurors might well have understood that statement to mean that Anderson's refusals might be considered along with other evidence as proof of Fletcher's guilt.

"The opinion of the Court in the *Namet* case makes clear that the features we have enumerated are critical in the problem before us." *Fletcher* v. *United States*, 332 F. 2d 724, 726.

All considerations present in *Fletcher* were equally present here, save the last one, (6), and in the interest of comparison we will set forth hereinafter the instruction given by the trial court to the jury in this cause.

"The witness Frank Anthony Dalia after having given some testimony made claim to the constitutional right against self-incrimination, which claim was sustained by the Court. The fact that said witness made said claim and that said claim was sustained by the Court is not to be given any weight or consideration by you arriving at your verdict." (App. 19-20)

We submit that five features out of six do not make this problem less critical than it was in *Fletcher*, and submit that there is a conflict in Circuits between the Eighth in this case, and the Court of Appeals for the District of Columbia in *Fletcher* v. *United States*, 332 F. 2d 724.

It is recognized that the Government made no more than fleeting reference to point two, and none at all to point four of the reasons we urge upon this Court for granting the Writ of Certiorari. What references it did make to the eliciting of the admission of a plea of guilty by the co-defendant, Dalia, have no relation to the case at bar. In opposition to issuance of the Writ for this reason, the Government, without further comment, merely cites, *Casados* v. *United States*, 300 F. 2d 845, and *United States* v. *Crosby*, 294 F. 2d 928. In *Casados* the objection to eliciting the testimony admitting the entry of a plea of guilty was raised on appeal for the first time. In *United States* v. *Crosby*, 294 F.2d 928, the plea was entered outside of the presence of the jury and the jury was not informed of the entry of the plea. It is difficult to see how the Government can assert these as established authority for the conduct in this cause. As to the fourth reason we advance to this Court, and also the fourth issue presented, the Government has not addressed itself at all.

We recognize it is contrary to the rules of this Court for a reply to contain matter that is readily ascertainable by the reviewing authority. However, in reciting the fact statement of the case, the petitioner used, as a form, the facts found to have been established by the Court of Appeals for the Eighth Circuit, supplementing some, chang-

ing nothing. The same cannot be said of the Government. A few of the more obvious instances of misstatement follow:

On Page 5 of the Government's Brief, the Government states that the petitioner did not object when the United States Attorney said that Dalia would be called as a Court's witness. On the contrary, when the Government requested that Dalia be called as a Court's witness for the purpose of cross-examination, counsel for petitioner immediately said "I would like to take up a matter outside the presence of the jury", and, upon the jury retiring, immediately stated his objection (Tr. 234-235).

It is absolutely impossible to reconcile the fact statement of the Government in two instances, which we will set forth without argument. At page 9 of the Government's Brief it states:

> "That Dalia had pleaded guilty was brought out early in the examination before it was clear that he would insist on claiming the privilege."

And yet at page 4, the Government admits he invoked the privilege on the second question, as follows:

> "After the jury returned, the government began its examination of Dalia, which may be summarized as follows: (1) after Dalia gave his name, he responded to the second question—whether he was also known as Anthony Walters—by invoking the Fifth Amendment; . . ."

The second instance is to be found at page 6 of the Government's Brief, where it is argued:

> "No mention was made during the examination that Dalia's Indiana sentence ran concurrently with his sentence for entering the bank in Altoona."

Immediately thereafter at page 7 of the Government's Brief it states:

> "When the jury entered, the Court ordered Dalia—despite his repeated protests that his 'rights' were being violated—to take the witness stand. Petitioner's counsel, resuming cross-examination, asked the witness six questions: * * * and (6) whether, in view of his plea of guilty, he had been sentenced concurrently for the Altoona bank theft."

CONCLUSION.

We respectfully submit to the Court that this case does represent and involve important questions in the administration of federal law which should be settled by this Court, and the conduct of this case sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. For the foregoing reasons, we submit this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH
ANNA R. LAVIN,
Attorneys for Petitioner

Office-Supreme Court, U.S.
FILED
NOV 6 1964
JOHN F. DAVIS, CLERK

No. 160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

HARRY R. SMITH, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR REHEARING

THURMAN ARNOLD
1229 - 19th Street, N.W.
Washington, D. C. 20036

MAURICE J. WALSH
105 West Adams Street
Chicago, Illinois 60603

ANNA R. LAVIN
209 S. La Salle Street
Chicago, Illinois 60604

Attorneys for Petitioner

Of Counsel

DANIEL A. REZNECK
ARNOLD, FORTAS & PORTER
1229 - 19th Street, N.W.
Washington, D. C. 20036

November 6, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
I. Reasons for Rehearing	2
II. The Conflict of Decisions	8
III. The Importance of the Issues in this Case	14
Appendix	1a

TABLE OF CASES

CASES:

Douglas v. *State of Alabama*, certiorari granted, No. 313, October Term 1964 14-15
Fletcher v. *United States*, 332 F. 2d 724 (D.C. Cir. 1964) 2-3, 5, 8-13
Krulewitch v. *United States*, 336 U.S. 440 (1949) 13
Namet v. *United States*, 373 U.S. 179 (1963) 10
Wong Sun v. *United States*, 371 U.S. 471 (1963) 11

OTHER AUTHORITIES:

1963 Report of the Administrative Office of the United States Courts 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 160

HARRY R. SMITH, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR REHEARING

The petitioner, Harry R. Smith, respectfully asks this Court to grant him a rehearing of its order denying his Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, issued on October 12, 1964.

1. Reasons for Rehearing

We are not unaware of the heavy burden on counsel in a Petition for Rehearing. It is our belief, however, that in denying the original writ the Court may have relied upon a statement in the opinion of the Court of Appeals which is contrary to the record. Had that statement been correct it might have established a distinction between the facts in the case at bar and the decision of the United States Court of Appeals for the District of Columbia in *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964), which we assert is in irreconcilable conflict with the decision of the Eighth Circuit in this case.

In the papers filed in the original Petition for Writ of Certiorari counsel did not point out this misstatement of the record by the Court of Appeals and this Court may well have relied on its correctness in denying certiorari. When that error is corrected, there remains no basis for distinguishing the facts in the case at bar from those in *Fletcher*.[1] In order to understand the effect of the error of the Court of Appeals and the similarity of the *Fletcher* case to the case at bar, a brief review of the facts is necessary.

Petitioner was convicted of the burglary of the Altoona State Bank, Altoona, Iowa, which occurred dur-

[1] The *Fletcher* decision was not brought to the attention of the Court in the original petition for certiorari filed in this case on June 6, 1964, because the *Fletcher* case was not reported until August 10, 1964. The *Fletcher* case was cited in petitioner's reply brief, filed August 22, 1964, after the petition and the Government's opposition had already been distributed to the Court. That reply brief, however, did *not* call the attention of the Court to the factual error in the opinion of the Court of Appeals.

ing the night of October 21-22, 1962. The evidence against petitioner was entirely circumstantial. That same night, a highway patrolman, who knew nothing about the bank burglary, attempted to stop the car in which petitioner was riding along with two other people. Instead of stopping, the car drove off closely followed by the patrolman. In the ensuing chase the automobile went off the road; the driver was killed. Petitioner and a man named Dalia, who was named in the indictment along with petitioner, were injured but survived. A search along the road behind the fleeing car disclosed a sack of burglar tools and also amounts of currency which were attached to deposit slips of the Altoona State Bank.

The prosecutor was not willing to rest his case against petitioner on this evidence. To bolster up the inferences which could be drawn from these circumstances, the prosecutor resorted to a device which is becoming increasingly common in criminal trials where an accomplice is involved.

Dalia had previously entered a plea of guilty to the charge in the joint indictment of himself and petitioner. In order to get that plea before the jury, the prosecutor asked that the court call Dalia as the court's witness, stating that "the Government feels this witness has information bearing on this case, but the Government in view of his implication is not prepared to vouch for him." He made no representation whether or not he knew or whether he had considered the likelihood that Dalia would invoke the Fifth Amendment. Objection by counsel for petitioner against the calling of Dalia under these circumstances was overruled.

As anyone would have anticipated from the position that Dalia was in,[2] Dalia invoked the Fifth Amendment on all questions asked by the prosecutor except that he stated his name, residence, and admitted that he had been involved in an automobile accident on the night of the bank burglary. The very reasonable expectation Dalia would invoke the Fifth Amendment was confirmed on the prosecutor's second question when Dalia invoked the Fifth Amendment, as to whether he had been known as Anthony Walters.

Immediately thereafter, the prosecutor sought to bring out the fact that Dalia had been indicted and had pleaded guilty of entering Altoona State Bank with the intent to commit a felony. Again, Dalia invoked the Fifth Amendment, but the Court ruled that he must answer. Dalia then admitted that he had pleaded guilty. Eliciting Dalia's plea of guilty before the jury had the same effct as if his confession had been admitted in evidence.

But even Dalia's guilty plea was not enough for the prosecutor. Apparently realizing that the jury might think that Dalia's plea of guilty did not *necessarily* implicate the petitioner Smith and certainly knowing at that time that Dalia would invoke the Fifth Amendment, the prosecutor went on asking questions linking petitioner to Dalia as an accomplice. He elicited from the witness after each question the damaging statement that the answer would incriminate him. The prosecutor inquired who was in the car with Dalia at the time of the accident on October 22, 1962; whether he knew petitioner Smith; how long he was in Iowa on the date of October 22, 1962; whether he left Chicago

[2] Dalia was a defendant in a pending state prosecution and still faced the possibility of a federal prosecution for conspiracy.

with the petitioner Smith; how long he was in Altoona, Iowa, on October 21, 1962, or the early morning of October 22nd; how long the petitioner Smith was in Altoona on those two nights; and whether Dalia entered the front door of the Altoona State Bank on that date (Tr. 237-240). Dalia answered all these questions by the invocation of his constitutional rights against self-incrimination. Taken together with Dalia's enforced admission of a plea of guilty, the questions and answers clearly implicated the petitioner Smith. Dalia's refusal to answer on the ground that truthful answers would incriminate him could only mean one thing to a man of common sense sitting on the jury: that Dalia and petitioner Smith were accomplices. Hence the inference drawn from Dalia's plea of guilty was enlarged to implicate petitioner Smith with him. The Government in this case deliberately strove for that effect and got it.

These facts make the decision in this case in complete conflict with *Fletcher* v. *United States*, as we show later in a point-by-point analysis of the two cases. But the Court of Appeals made a finding in its opinion which, if correct, might be the basis of distinction between this case and *Fletcher*. In *Fletcher* the United States Attorney felt that it was his duty to call the court's attention to the fact that the witness, who subsequently invoked the Fifth Amendment, might refuse to testify. 332 F.2d at 725. In the case at bar, the Court of Appeals found as a fact "the Government did not know what Dalia's testimony would be as it had made no inquiry from him prior to the time he was placed on the stand." (Petition for Certiorari, App. 17)

It strains credulity that the Government did not anticipate what the witness would do. However, when

counsel for petitioner tried to find out whether the Government had inquired what the petitioner would do, the court closed off this avenue of information.

> "Q. (By Mr. Lawyer) Mr. Dalia, did you or did you not advise anyone on behalf of the prosecution or an official of this court that you would refuse to testify prior to coming to Court yesterday?—
>
> "MR. LAWYER: I request the Court to instruct the witness to answer.
>
> "THE COURT: The Court will not require the witness to answer." (Tr. 273)

Certainly it became the duty of the prosecutor at this point to affirm or deny whether or not he had seen the witness or whether or not he reasonably anticipated that the witness would rely on his privilege against self-incrimination. If the prosecutor anticipated that the witness would refuse to answer by invoking the Fifth Amendment and under that belief called the witness, it would indicate that he intended to use the witness' refusal to answer as evidence against petitioner. Certainly if he had inquired of the witness what the witness was going to do, and the witness had informed him in advance that he was going to use the Fifth Amendment, the prosecutor's resort to this sort of testimony should be condemned.

Contrary to the statement of the Court of Appeals, the record is silent as to whether the prosecutor had conferred with the witness and what he anticipated. The burden of proof is certainly not on petitioner to justify the prosecutor's conduct. That burden is on the Government, since the matter was exclusively within the prosecutor's knowledge. In respect to this

issue, the Government made no explanation to the court. In the absence of such an explanation, it should be presumed that the prosecutor either knew or anticipated that the witness would take the Fifth Amendment. If so he was using the witness as a device to bring before the jury the damaging inferences which common sense men would draw from the witness' refusal to answer on the grounds that the answer might incriminate him.

The vice of presenting to the jury a witness who takes the Fifth Amendment is that it deprives the defense of any opportunity to cross-examine the witness. Therefore, it is impossible for the defense to rebut the implication that there were guilty dealings between the petitioner and the witness which the witness dare not expose without incriminating himself. All the defense gets on cross-examination is a further refusal to answer. Furthermore, the refusal of the witness to answer the cross-examiner's questions is likely to make as bad an impression on the jury as the refusal to answer the prosecutor's questions. For example:

> "Q. (By Mr. Lawyer) Mr. Dalia, I ask your whether or not you have any information which would bear on the innocence of Harry Smith sitting here to the left of me two persons down, this man sitting right here?—
>
> "MR. LAWYER: I request the Court to instruct the witness to answer.
>
> "THE COURT: The Court will not require the witness to answer." (Tr. 273)

The impression that this makes on a jury is that if the witness told the truth in answer to that question, it would implicate the petitioner as an accomplice.

The right of cross-examination is so completely destroyed by the device employed in this case that it would be better for the defense not to have attempted any cross-examination whatever.

Having established, we hope, that the court's finding that the prosecutor did not know what position the witness was going to take is in error, we will compare the situation in the *Fletcher* case and the case at bar point by point. We think this examination shows that there is an irreconcilable conflict between the decision in this case and *Fletcher*.

2. The Conflict of Decisions

The opinion of the Court of Appeals for the District of Columbia in the *Fletcher* case is set out in full in the Appendix to this Petition. In brief, the *Fletcher* case was a prosecution for robbery in which the Government alleged that the defendant and two companions hailed a cab, directed the driver to take them to a certain address, and on arrival beat and robbed him. One of the defendant's alleged companions, Anderson, was a juvenile who was found involved in the offense by the Juvenile Court of the District of Columbia and sent to the National Training School. At the commencement of the trial of Fletcher, the prosecutor informed the trial court that Anderson had indicated he would refuse to testify against Fletcher. The trial court appointed counsel for Anderson and ascertained that Anderson would invoke his privilege against self-incrimination. In the presence of the jury Anderson gave his name, address, and age. He thereafter invoked his constitutional privilege as to a series of questions by the prosecutor relating to Fletcher's presence with him on the night of the crime, whether

they had hailed a cab together, whether they had directed the driver to take them to a certain address, and whether on arrival they had attacked and robbed him. The court then halted the questioning and Anderson left the stand.

The Court of Appeals reversed Fletcher's conviction and held that "inferences from Anderson's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced Fletcher." (332 F.2d at 727). Petitioner's case is indistinguishable from Fletcher's on any material ground. Indeed, in so far as there are factual differences between the two, they make petitioner's a more compelling case for reversal of his conviction than was Fletcher's. Comparison of the features relied on for reversal in *Fletcher* with the facts of the present case demonstrates the clarity of the conflict:

Fletcher	*The Present Case*
1. "The Government knew, and the court also knew, that Anderson would refuse to testify upon his claim of the privilege under the Fifth Amendment."	After giving his name, the witness Dalia invoked the Fifth Amendment to the next question and to all questions thereafter relating to the offense. Thus, at least from the second question on, both the prosecutor and the trial court knew that Dalia would refuse to testify. Nevertheless, the prosecutor continued to ask question after question about the offense and Dalia's association with petitioner on the night in question. Moreover, the prosecutor never denied that he knew Dalia would be

Fletcher	*The Present Case*
	uncooperative when called to the stand, although he had numerous opportunities to do so. The statement of the court below that "The government did not know what Dalia's testimony would be as it had made no inquiry from him prior to the time he was placed on the stand." has no support in the record, as we have shown. In fact when counsel for petitioner asked Dalia whether he had advised the prosecution or any court official before coming to court that he would refuse to testify, the trial court refused to let the question be answered.
2. "The prosecutor asked a series of questions, which depicted the alleged offense in its entirety. The questions were not a 'few lapses' as referred to in [*Namet* v. *United States*, 373 U.S. 179 (1963)]."	The prosecutor also asked a series of questions covering the commission of the offense and the association and presence of the petitioner with Dalia at the time of the crime. The prosecutor repeatedly linked Dalia and the petitioner in his questions. Moreover, the prosecutor elicited, and the court required Dalia to answer, that he had pleaded guilty to the same crime with which petitioner was charged. The jury was also told that Dalia and petitioner were jointly indicted. In *Fletcher*, the jury was never told that Anderson had been found involved in the crime by the Juvenile Court.

Fletcher	*The Present Case*
3. "The testimony sought from Anderson was the principal source of support for the testimony of the Government's only witness, the cab driver, and thus, if the jury drew inferences from Anderson's refusal to answer, those inferences would have served that purpose."	The Government's case was even slimmer than in *Fletcher*, as an experienced trial lawyer or judge can readily discern. Not only was there no eyewitness to petitioner's participation, there was none to the crime itself—the Government could not even fix the time of its commission. There was no finding of any property taken from the bank on petitioner or any of his companions such as would support the inference arising from possession of recently stolen property. There was no finding of any instrumentalities of the crime on petitioner or any of his companions. The bag of tools, money and bank slips found on the highway were not seen to come from the automobile in which petitioner was a passenger. The flight of the automobile, itself a dubious index of guilt, see *Wong Sun* v. *United States*, 371 U.S. 471, 483 (1963) could not be attributed to petitioner in any event because he was not the driver. Since Dalia's guilty plea was not admissible against petitioner, as the trial court acknowledged, petitioner's assoication with Dalia could give rise to no legitimate inference of guilt. The danger of using the testimony sought from Dalia

Fletcher	*The Present Case*
	as a substitute for proof linking petitioner to the crime is self-evident.
4. "Anderson's refusals to testify were not incidents in the course of other admissible testimony given by him. He gave no other testimony. Save for the formalities, such as name, age and address, his refusals constituted the whole of his participation in the case."	The only questions by the prosecution which Dalia answered willingly were: his name; how he pronounced it; where he lived and how long he had lived there; whether he was involved in an accident on October 22, 1962, and where it occurred; whether he was taken to a hospital and where it was. As in *Fletcher*, all other questions related to Dalia's guilt of the offense with which petitioner was charged and petitioner's association and presence with him at the time of the crime.
5. "Anderson's refusals were not mere incidents in a long trial. The trial was a short one, actually occupying some six hours spread over parts of two days, and Anderson's part in it was a major feature of the proceeding."	The prosecution's case against petitioner took only two days to present. Petitioner's case lasted less than one day. Dalia appeared before the jury on two successive days, and his testimony came as the climax to the prosecution's case. The prosecution rested shortly after he left the stand.
6. "Although the court instructed the jurors that they should draw no inferences of guilt from Anderson's refusals, it added that the exercise by Anderson of his constitutional right 'does	Although the court instructed the jurors that they should not give any weight or consideration to Dalia's claim of the privilege against self-incrimination and that his guilty plea did

Fletcher	*The Present Case*
not mean by itself, of course, that this defendant is guilty.' The jurors might well have understood that statement to mean that Anderson's refusal might be considered along with other evidence as proof of Fletcher's guilt."	not give rise to any inference as to the petitioner's guilt, he invited them to consider Dalia's appearance on the stand against the petitioner by giving the instruction on evaluation of the testimony of an accomplice. Furthermore, the "naive assumption that prejudicial effects can be overcome by instructions to the jury . . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (concurring opinion of Mr. Justice Jackson).

In sum, even a cursory examination of the two cases shows that they are inescapably in conflict and that if Fletcher was unfairly prejudiced by what occurred in his case, prejudice justifying a new trial for petitioner is a moral certainty. Petitioner faces a 20-year sentence for a crime not involving violence and not against the person, on a conviction which would be followed by reversal in the District of Columbia as day follows night.

This is not a conflict of minor significance. The Eighth Circuit has taken a position contrary to that of a Court of Appeals which has vast experience and expertness in the administration of the criminal law and decides more criminal appeals than any other federal court.[3] If the Court of Appeals for the District

[3] 1963 Report of the Administrative Office of the United States Courts, p. 193.

of Columbia is wrong in its interpretation of the law as laid down by this Court, it is for this Court to say so. Petitioner submits that the Court of Appeals for the District of Columbia is right, and that it is the Eighth Circuit which requires correction by this Court.

3. The Importance of the Issues in This Case

This Court in the case of *Douglas* v. *State of Alabama*, No. 313, October Term 1964, has granted certiorari. In that case, a witness was put on who refused to answer, invoking the Fifth Amendment. Thereupon the prosecution read to the witness his confession implicating the defendant. This Court granted certiorari.

It would seem that if certiorari were granted in the *Douglas* case, it should also be granted in the case at bar. This would afford the Court an opportunity to clarify the entire situation with respect to the device, now so commonly used, of putting on a witness to take advantage of the effect before the jury of his refusal to answer on the ground of self-incrimination. In the *Douglas* case, a confession was used for that purpose. In the case at bar, its equivalent, plea of guilty, was introduced. And then, with full knowledge that the witness was going to refuse to answer, a series of questions was asked relating to the alleged participation of petitioner in this case with the witness who had pleaded guilty. If this Court is to review the *Douglas* case, it should not neglect the opportunity to clarify the law by reviewing the parallel issue in a very closely similar situation.

Furthermore, if *Douglas* is to delineate the contours of a constitutional right, it would be ironic to deny

petitioner the opportunity to demonstrate its applicability to his case simply because his petition came to this Court too soon. And it would be an intolerable paradox if this Court, charged with the supervision of criminal justice in the Federal courts, should hold that the states are precluded by the Fourteenth Amendment from convicting a defendant in this fashion and yet leave standing a criminal conviction obtained in a Federal court in the same manner.

WHEREFORE, petitioner respectfully submits that this Court recall its order of October 12, 1964, denying certiorari in this cause, that it consider the questions raised in the Petition for Certiorari together with the similar question raised in *Douglas* v. *State of Alabama*, *supra*, in which this Court has granted its Writ of Certiorari, and that his petition for rehearing should be granted.

Respectfully submitted,

THURMAN ARNOLD
1229 - 19th Street, N.W.
Washington, D. C. 20036

MAURICE J. WALSH
105 West Adams Street
Chicago, Illinois 60603

ANNA R. LAVIN
209 S. La Salle Street
Chicago, Illinois 60604

Attorneys for Petitioner

Of Counsel

DANIEL A. REZNECK
ARNOLD, FORTAS & PORTER
1229 - 19th Street, N.W.
Washington, D. C. 20036

November 6, 1964

Certificate of Counsel

Thurman Arnold, one of counsel for petitioners, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to the grounds as specified therein.

THURMAN ARNOLD

APPENDIX

ROBERT J. FLETCHER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 18223.

United States Court of Appeals
District of Columbia Circuit.

Argued March 26, 1964.

Decided April 30, 1964.

Before BAZELON, Chief Judge, PRETTYMAN, Senior Circuit Judge, and WASHINGTON, Circuit Judge.

PRETTYMAN, Senior Circuit Judge:

Appellant Fletcher was indicted, tried and convicted on a charge of robbery. The allegations were that he and two companions hailed a cab and directed the driver to take them to a certain address, and that upon arrival there they beat the driver almost into unconsciousness and robbed him. One of the alleged robbers was a juvenile named Anderson. He was apprehended and referred to the Juvenile Court, which sent him to the National Training School. He later testified before the grand jury, relating the affair of the robbery as the Government claimed it to be.

Upon the trial of Fletcher in the District Court, the prosecutor informed the court, before the jury was sworn, that Anderson had indicated that he would refuse to testify. The prosecutor took the position that Anderson could not assert the privilege against self-incrimination, since he had already been prosecuted for the offense. No ruling was made on the question, and after this announcement the case proceeded. The Government called the cab driver and then a friend of the appellant. The Government then called Anderson. He answered to his name and address

and then, when asked if he knew Fletcher, stood mute. The court excused the jury. Anderson answered to his age (16), height (6 feet 3½ inches), and weight (206 pounds). Asked whether he had appeared in Juvenile Court in regard to the robbery, he stood mute. The court was told by counsel that he had been sent to the National Training School by the Juvenile authorities. The court then said that he would appoint an attorney for the witness and directed the assignment office to secure a lawyer. The court assigned one of the assistants from the Legal Aid Agency. The situation was explained to him, and Anderson's testimony before the grand jury was read to him. The cab driver was recalled to the stand and identified Anderson as one of his assailants. The proceeding was recessed until the next morning. At that time Anderson's testimony before the grand jury was read again to the court, and the cab driver again identified Anderson as one of his assailants. The court was advised, by Anderson's counsel, that Anderson's "position will be that he will not answer on the grounds that it may incriminate him." The court ruled that the jury had a right to hear the questions put to the witness. Anderson's attorney announced that he had no objection. Counsel for Fletcher objected upon the ground that the procedure created an atmosphere of definite prejudice to Fletcher. The jury was recalled, and Anderson resumed the witness stand. He stated his name, address and age. He was then asked, "Do you know the defendant in this case?", and he answered, "I refuse to answer on the grounds that it might incriminate me." He was then asked the following questions, to each of which he made the foregoing reply:

> "Were you with the defendant on March 2, 1963?"
>
> "Were you in his company at approximately 3:30 a.m. on March 2, 1963?"
>
> "Did you and he in the company of another boy hail a cab at about 14th and Otis Street, Northwest?"

"Did you ask this cabdriver to take you to 19th and Ingleside Terrace, Northwest?"

"Did you at that point after the taxicab driver had stopped his cab, gotten out and gotten back in, did you —did you put—did you and the defendant proceed to put your arms around his throat?"

"On March 2, 1963, did you and the defendant drive this taxicab through Rock Creek Park?"

"Did you in the company of the defendant take a ring and money and identification card from the taxicab driver on March 2, 1963?"

He was then asked whether he had appeared before the grand jury. At that point the court stopped the questioning and the witness stepped down. The defense put Fletcher on the stand as its sole witness.

In the course of his instructions to the jury the trial judge said, referring to Anderson and his refusal to testify:

"He had the constitutional right to do that. He didn't have to testify, if he felt that any answer might implicate him in this crime that this defendant is being tried for.

"Now, you must not infer or conclude by reason of the fact that Anderson elected to rely on his constitutional right and refused to testify in answer to these questions that that probably means this defendant is guilty.

"You must draw no inferences along those lines, no presumptions, or anything like that.

"I thought I would mention that to you, that was his constitutional right and that does not mean by itself, of course, that this defendant is guilty."

The question before this court is whether the proceedings involving the witness were so unfair in their prejudice to the defendant on trial as to constitute reversible error. The question is not new. It has been considered by several Circuit Courts of Appeals and was before the Supreme Court last term in Namet v. United States.[1] The Court referred to several federal cases and said that none of them suggests that reversible error is invariably committed whenever a witness claims his privilege, but that rather those courts "have looked to the surrounding circumstances in each case, focusing primarily on two factors, each of which suggests a distinct ground of error."[2] One of these grounds relates to prosecutorial misconduct, and the other "seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant."[3]

Among the circumstances of the case at bar are the following features: (1) The Government knew, and the court also knew, that Anderson would refuse to testify upon his claim of the privilege under the Fifth Amendment. (2) The prosecutor asked a series of questions, which depicted the alleged offense in its entirety. The questions were not a "few lapses" as referred to in *Namet*. (3) The testimony sought from Anderson was the principal source of support for the testimony of the Government's only witness, the cab driver, and thus, if the jury drew inferences from Anderson's refusal to answer, those inferences would have served that purpose. (4) Anderson's refusals to testify were not incidents in the course of other admissible testimony given by him. He gave no other testimony.

---

[1] 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963).

[2] *Id.* 373 U.S. at 186, 83 S. Ct. 1151.

[3] *Id.* 373 U.S. at 187, 83 S. Ct. 1151.

Save for the formalities, such as name, age and address, his refusals constituted the whole of his participation in the case. (5) Anderson's refusals were not mere incidents in a long trial. The trial was a short one, actually occupying some six hours spread over parts of two days, and Anderson's part in it was a major feature of the proceeding. (6) Although the court instructed the jurors that they should draw no inferences of guilt from Anderson's refusals, it added that the exercise by Anderson of his constitutional right "does not mean by itself, of course, that this defendant is guilty." The jurors might well have understood that statement to mean that Anderson's refusals might be considered along with other evidence as proof of Fletcher's guilt.

The opinion of the Court in the *Namet* case makes clear that the features we have enumerated are critical in the problem before us. The Court held in that case that Namet's substantial rights were not affected. In doing so it pointed out that the two witnesses involved possessed extensive non-privileged information, as to which they testified, and that the prosecutor, in eliciting this and other relevant testimony, asked only four questions which were privileged. The Court viewed "these few lapses" in the context of the entire trial. It said that the effect of these four questions was minimized by the lengthy non-privileged testimony given by the witnesses. The Court said: "In this case the few claims of testimonial privilege were at most cumulative support for an inference already well established by the nonprivileged portion of the witness' testimony."[4]

We do not have to consider whether a clear, forceful instruction to the jury, precluding any inferences from Anderson's refusals to testify, would have cured the prejudice inherent in the situation. The instruction, which we

[4] *Id.* 373 U.S. at 189, 83 S. Ct. 1151.

have quoted, seems to us to have left the situation much in doubt. We are of opinion that in the circumstances of this case, viewed in their entirety, inferences from Anderson's refusal to answer added critical weight to the prosecutor's case in a form not subject to cross-examination, and thus unfairly prejudiced Fletcher.[5] They affected his substantial rights. The judgment of the District Court must, therefore, be

Reversed.

[5] No argument was made to us with respect to the question whether or not Anderson was justified in relying on the Fifth Amendment right not to incriminate oneself, since he had already been subjected to the jurisdiction of the Juvenile Court and committed to a training school. We express no opinion on the subject. See D.C. Code §§ 11-915, 11-916 (1961 ed.); United States v. Dickerson, 106 U.S. App. D.C. 221, 271 F. 2d 487 (D.C. Cir. 1959).